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In Equity, No. 420.

In the District Court of the United States, District of Utah.

UNITED STATES OF AMERICA, PETITIONER,

v.

SOUTHERN PACIFIC COMPANY, CENTRAL PACIFIC RAILWAY COMPANY, ET AL.,

DEFENDANTS.

BRIEF OF DEFENDANTS.

J. P. BLAIR,
P. F. DUNNE,
GARRET W. McENERNEY,
Of Counsel.

WM. F. HERRIN,
Solicitor for Defendants.

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In the

District Court of the United States

FOR THE DISTRICT OF UTAH.

Before Honorable Walter H. Sanborn,
Honorable William C. Hook, and
Honorable John E. Carland,
Circuit Judges.

United States of America, Petitioner, vs. Southern Pacific Company, Central Pacific Railway Company, Union Trust Company of New York, William Sproule, Julius Kruttschnitt, Robert Goelet, Cornelius N. Bliss, Walter P. Bliss, Henry W. De Forest, J. Horace Harding, Charles W. Harkness, Henry E. Huntington, James N. Jarvie, Leonor F. Loree, Lewis J. Spence, Eric P. Swenson, James N. Wallace and Ogden Mills, Defendants.	**In Equity No. 420**

BRIEF OF DEFENDANTS.

Statement of the Case.

The Government seeks by this suit to dismember the Southern Pacific-Central Pacific system of railroads by requiring the Southern Pacific Company to divest itself of the ownership of the Central Pacific lines upon the ground that such ownership

violates (*a*) the Pacific railroad laws,* and (*b*) the Anti-trust Law of July 2, 1890.

The system thus sought to be destroyed has existed in its present form from the construction of the roads, which began with the Civil War and ended, we may say for present purposes, on February 1, 1883, when the Sunset-Gulf line† of the Southern Pacific was opened to New Orleans.

The ownership of the Southern Pacific in the Central Pacific lines, so sought to be terminated, arises out of (*a*) a 99-year lease of those lines, made early in 1885, several times modified in particulars not important here, and (*b*) the ownership of all of the stock of the Central Pacific Railway Company acquired by the Southern Pacific Company in 1899 as an integral part of the settlement and payment of the Central Pacific debt to the Government, amounting to $58,812,715.48, made under the authority of and in conformity to the Act of July 7, 1898. (30 Stat. 652, 659.)

It appears from this that the proprietary interest of the Southern Pacific in the Central Pacific lines antedates the

*Act of July 1, 1862 (12 Stat. 489); Act of July 2, 1864 (13 Stat. 356); Act of March 3, 1865 (13 Stat. 504); Act of July 3, 1866 (14 Stat. 79); Act of June 25, 1868 (15 Stat. 79); Resolution of April 10, 1869 (16 Stat. 56); Act of June 20, 1874 (18 Stat. 111); Act of June 19, 1878 (20 Stat. 169).

The Acts of 1862 and 1864 provide that the roads which constitute the line from the Missouri River to the Pacific Ocean shall be operated and used "as one connected, continuous line," and that each of the constituents of the road from the Missouri River to the Pacific Coast shall afford and secure to each of the other constituents of that line equal advantages and facilities as to rates, time and transportation without any discrimination of any kind in favor of the road or business of any or either of the others. The Government here contends that the unification of the Central Pacific and Southern Pacific violates these Pacific Railroad laws, not for a failure to afford advantages or facilities nor for discrimination, but upon the ground that no constituent of the Pacific roads can be interested in or united with any railroad property which is competitive with any other constituent of that line.

†The Sunset-Gulf line of the Southern Pacific Company is the name given by and used in that company to describe the rail line from San Francisco to Galveston and New Orleans and thence by water to New York. The Sunset line of the Southern Pacific Company is the name given by and used in that company to describe the rail line from San Francisco to New Orleans and thence by rail connections to the Atlantic Coast. In the record, however, the line by rail to New Orleans and thence by water to New York is spoken of sometimes as the Sunset line and sometimes as the Sunset-Gulf line.

Anti-trust Law of July 2, 1890, by more than five years. It appears, too, that a second form of ownership was acquired in 1899, *in a transaction with the Government, authorized by an act of Congress, and executed and approved, as we shall see, by President McKinley and three members of his cabinet: Secretary of the Treasury Lyman J. Gage, Secretary of the Interior Cornelius N. Bliss, and Attorney General John W. Griggs, and confirmed by two Acts of Congress.*

Moreover, a consideration of the operation of the properties comprising the Southern Pacific-Central Pacific system from the time of their construction—indeed, from the time when the lines were projected—shows that they were built to constitute one system, that in point of fact they were constructed as one system, and that, since their construction, they have always been operated as one system.

The present proprietary relation of the Southern Pacific Company to the Central Pacific Company has been stated. It should be emphasized, however, that the unification of these companies, which takes its present form from the lease of 1885 and the subsequent modifications (not to mention the stock ownership), did not arise for the first time with the lease of 1885, nor is it the result of any artificial, latter-day joinder. The lease of 1885 is but the latest step in the adjustment of the relationship of the two companies, which have been so intimately and naturally connected from the outset in one form or another, in ownership, construction and operation, that they have always been regarded as two companies with a single identity.

It is appropriate once again briefly to refer to the fact that one of the claims put forward in this suit is that the operation of these lines as one system of railroads constitutes a violation of the Pacific railroad laws. The Government has allowed this alleged violation of the Pacific railroad laws to go unchallenged since the system was first operated. It is now, therefore, under obligation to show that the operation it has permitted for nearly a third of a century has been for all that time illegal and in violation of the laws of Congress.

It is also to be noted that, inasmuch as the system of railroads here involved was built to be and always has been one system, there never has been a point of time when the lines were

operated except as one system; and hence, there never has been a point of time at which it may be said that a combination of these lines was effected with a view to the suppression of competition, or, indeed, that a combination of the lines was effected at all.

Again, so far as the cause of action of the Government is based upon the Anti-trust Law of July 2, 1890, the suit is not brought to destroy a combination effected to suppress competition, but it is maintained by the Government to dismember a system of railroads constructed and operated as a unified whole. The suit is based upon the claim that one part of this system "is a *natural* competitor" of another part of the system, and that therefore the sum total of competitive traffic would be increased if these parts were no longer allowed to remain component parts of the system of which they have always been parts in projection, construction and operation.

Obviously, the claims of the Government here put forward constitute a new departure and a very marked advance in Government interpretation of the office and function of the Anti-trust Law of July 2, 1890.

If these claims can be sustained in respect of the Southern Pacific-Central Pacific system of railroads, no man can forecast the consequences of such a doctrine applied to all the systems of railroads in America.

The foregoing puts in broad outline the controversy here involved, and we need dwell only for a moment on the parties defendant in the case.

The defendants are three corporations and eleven individuals—the eleven individuals being directors of the Southern Pacific Company.

The three corporations are

(*a*) Southern Pacific Company, joined because (1) it is the lessee under the 99-year lease and its modifications, (2) it is the owner of the stock above mentioned, and (3) it operates the lines sought to be withdrawn from the system;

(*b*) Central Pacific Railway Company, joined because (1) it is the owner of the lines sought to be withdrawn from the system, (2) it is the lessor under the 99-year lease, as modified,

and (3) it is the company whose stock is held by the Southern Pacific Company in alleged violation of law; and

(*c*) Union Trust Company of New York as trustee under a deed of trust for holders of an issue of bonds of the Southern Pacific amounting to $36,819,000, put out in 1899 as part of the plan for the payment of the debt due from the Central Pacific to the Government and used in acquiring the stock, preferred and common, of the new and reorganized Central Pacific Railway Company, which stock so acquired by the Southern Pacific Company is pledged to secure the payment of said issue of $36,819,000.

In the consideration of this case we may, with profit, briefly refer to the movement in the country at large and on the Pacific Coast for the building of a transcontinental railroad during the period commencing, say, with the acquisition of the Pacific Coast by the United States and running down to the enactment of the Act of July 1, 1862, incorporating the Union Pacific Railroad Company and providing for a transcontinental line from the Missouri River to the Pacific Ocean. From this latter date, events follow in obvious sequence.

(1) FROM THE CESSION OF UPPER CALIFORNIA TO THE UNITED STATES BY MEXICO UNDER THE TREATY OF GUADALUPE HIDALGO FEBRUARY 2, 1848, TO THE INCORPORATION OF THE CENTRAL PACIFIC RAILROAD COMPANY UNDER THE LAWS OF CALIFORNIA, JUNE 28, 1861, FOLLOWED BY THE ACT OF JULY 1, 1862 (12 STAT. 489).

On August 15, 1846, during the war with Mexico, California, then of undetermined boundaries, was declared to be a territory of the United States. (See U. S. *v.* Yorba (1864), 1 Wall. 412.) California was ceded to the United States by Mexico under the treaty of Guadalupe Hidalgo February 2, 1848, and in 1850, with its present limits between the parallels of 32° 40′ and 42° north latitude, it was admitted to the Union.

The United States became the undisputed sovereign owner

of the territory between the forty-second and forty-ninth parallels by the settlement in 1846 of the Northwest boundary dispute with Great Britain. On August 14, 1848, Oregon Territory was formed, extending from the northern boundary line of California to the forty-ninth parallel, now the northern boundary line of the State of Washington and of the United States, and from the Rocky Mountains to the Pacific. (9 Stat. 323.) In 1848, therefore, the whole Pacific slope had become American territory.

From 1850 to 1862 there was constant agitation for the building of a railroad or railroads to the Pacific Ocean. This agitation was evidenced by the almost annual resolutions and memorials of the California legislature urging the construction of a Pacific railroad,* and by the agitation of its senators and representatives in Congress, in season and out of season.

In the Sinking Fund Cases (1879), 99 U. S. 727, note is taken of this fact, because the court said, speaking of an act passed by the Legislature of California facilitating railroad construction:

> "In so doing, the State but carried out its original policy in reference to the same subject-matter, for as early as May 1, 1852, an act was passed reciting 'that the interests of this State, as well as those of the whole Union, require the immediate action of the government of the United States, for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the purposes of national safety, in the event of war and to promote the highest commercial interests of the Republic', and granting the right of way through the State to the United States for the purpose of constructing such a road. Hittell's Laws, sect. 4791; Acts of 1852, 150. In 1859 (Acts of 1859, 391), a resolution was passed calling a convention 'to consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific, and to adopt measures whereby the building of said railroad can be accomplished'; and at the same session of the legislature a

*See Statutes of California: 1850, p. 465; 1852, p. 276; 1853, p. 315; 1854, pp. 266, 276; 1857, pp. 370, 371; 1859, pp. 391, 393, 395.

> memorial was prepared asking Congress to pass a law authorizing the construction of such a road, and asking also a grant of lands to aid in the construction of railroads in the State. Acts of 1859, 395. Nothing was done, however, by Congress until the Rebellion, which at once called the attention of all who were interested in the preservation of the Union to the immense practical importance of such a road for military purposes, and then, as soon as a plan could be matured and the necessary forms of legislation gone through with, the act of July 1, 1862, was passed."

Although definitive action was not taken until 1862, the matter played a large part in the proceedings of Congress during the preceding years, but, owing to controversies over the location of the route and to opposition due to the effect that the road might have upon the question of slavery, no legislation was enacted until after the Civil War had commenced.

The matter, however, had been so settled in the minds of Californians that, before the Act of July 1, 1862 was passed by Congress and within three months after Fort Sumter had been fired upon, the Central Pacific Railroad Company was organized under the laws of the State of California. The date of its organization was June 28, 1861, and that incorporation, as shown by the articles themselves, and as is very frequently shown throughout the record in this case, was due to four men—Leland Stanford, C. P. Huntington, Mark Hopkins and Charles Crocker.

The corporate purpose of the Central Pacific Railroad Company was to build a railroad between the places designated as follows (P. Ex. 12, IV R. 1277):

> "The places from and to which the proposed road is to be constructed are the City of Sacramento and the Eastern Boundary of the State of California. The counties into and through which this road is intended to pass are: Sacramento, Placer, and Nevada."

(2) THE ACT OF JULY 1, 1862 (12 STAT. 489) AND THE CONSTRUCTION OF THE BOND-AIDED LINES FROM THE MISSOURI RIVER TO THE PACIFIC OCEAN, INCLUDING (a) THE CONSTRUCTION BETWEEN OGDEN AND SACRAMENTO BY THE CENTRAL PACIFIC, AND (b) THE CONSTRUCTION BETWEEN SACRAMENTO AND SAN JOSE BY THE WESTERN PACIFIC, WHICH LATTER COMPANY WAS ABSORBED BY THE CENTRAL PACIFIC IN CONSOLIDATION PROCEEDINGS JUNE 23, 1870.

The Act of July 1, 1862 (12 Stat. 489), created a corporation to be called "The Union Pacific Railroad Company", and to be composed of one hundred and fifty-eight persons named in the act (of whom C. P. Huntington was one), "together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors."

The corporation so created was "authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with the appurtenances, from a point . . . on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, . . . a point to be fixed by the President of the United States, . . . thence running westerly upon the most direct, central, and practicable route, through the Territories of the United States to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California."

As already shown, the Central Pacific Railroad Company had been incorporated under the laws of California the year before (June 28, 1861) to construct a road between "the city of Sacramento and the eastern boundary of the state of California." In the Act of July 1, 1862, now under consideration, this company was authorized to construct a line "from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California" to meet and connect with the Union Pacific upon

the same terms and conditions as the latter company. It was furthermore provided that whichever company first completed its respective part of the road from the designated terminus to the eastern boundary line of California was authorized to continue construction until the parts should meet and connect, and the whole line of railroad should be completed. (12 Stat. 489, sect. 10.)

The Act of July 2, 1864 (13 Stat. 356, sect. 16), authorized the Central Pacific Railroad Company to "extend their line of road eastward (from the California line) one hundred and fifty miles on the established route, so as to meet and connect with the line of the Union Pacific road", but the limitation of one hundred and fifty miles was repealed by the Act of July 3, 1866 (14 Stat. 79), so that the Central Pacific was, as originally provided, authorized to continue construction until it should meet the Union Pacific.

It appears from the Act of July 1, 1862, that Congress contemplated that three lines would start from points on the Missouri River, viz., Sioux City, Omaha (or, rather, Council Bluffs), and Kansas City, and that they would converge on the one hundredth meridian, forming the trunk line which was to be built westwardly, and that two other lines starting from points on the Missouri River, viz., St. Joseph and Leavenworth, would connect with the Kansas City line, thereby giving connection with the main line of five cities on the Missouri River.

Exactly what was intended in respect of the lines from Sioux City, Omaha and Kansas City to the one hundredth meridian is shown by the following from the opinion in *U. P. R. Co.* v. *Hall,* (1876) 91 U. S. 343, where it is said:

> "By the first section of the act of 1862, the Union Pacific Railroad Company was authorized to construct, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich to the western boundary of the Territory of Nevada. There it was intended to meet and connect with the line of the Central Pacific Railroad Company of California (sect. 8), thus forming a continuous line to the Pacific Ocean. This was the main line. But the same act made provision also for several eastern connections. The

ninth section authorized the Leavenworth, Pawnee and Western Railroad Company of Kansas (now the Kansas Pacific) to construct a railroad from the Missouri River, at the mouth of the Kansas River (on the south side thereof, so as to connect with the Pacific Railroad of Missouri), to the point of western departure of the Union Pacific on the one hundredth meridian. Thus provision was made for an eastern connection by an unbroken line of road to St. Louis on the Mississippi. This was not all. By the fourteenth section of the act the Union Pacific was authorized and required 'to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, . . . so as to form a connection with the lines of the said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa'. Thus provisions were made for the Iowa eastern branch of the main line. It was doubtless intended to render possible a connection with any railroad that might thereafter be constructed from the western boundary of Iowa eastward. None was then completed; but a railroad was in progress of construction through the State, from its eastern border to the Missouri River.

The fourteenth section also made provision for another eastern connection. It enacted, that whenever there should be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific (Union Pacific) Railroad Company should be authorized and required to construct a railroad and telegraph from said Sioux City, so as to connect with the Iowa branch, or with the main line, at a point not farther west than the one hundredth meridian of longitude."

The lines for which provision was made by the Act of July 1, 1862, are shown by Map I in the Appendix.

It thus appears what railroad construction was provided for in the Act of July 1, 1862, and it remains briefly to note what modifications of this contemplated construction were later authorized by Congress and actually accomplished.

As already noted, the Act of July 1, 1862, authorized the Leavenworth, Pawnee and Western Railroad Company of Kansas to build from Kansas City to the point of junction on the

one hundredth meridian. The name of this company was changed June 6, 1863, to the Union Pacific, Eastern Division (see *U. S.* vs. *U. P. Ry. Co.,* (1893) 148 U. S. 562), and subsequently by the joint resolution of Congress of March 3, 1869 (15 Stat. 348) became the Kansas Pacific. The Act of July 2, 1864, having provided that any company authorized to build a line of railroad from the Missouri River to the junction on the one hundredth meridian might connect its line west of that point, the Union Pacific, Eastern Division (Kansas Pacific), determined to build to Denver. The Act of July 3, 1866 (14 Stat. p. 79) gave the company authority to connect with the Union Pacific at a point not more than fifty miles westward from the meridian of Denver. Under the Act of March 3, 1869 (15 Stat. 324), the company contracted with the Denver Pacific Railway & Telegraph Company to construct the road from Denver to a connection with the Union Pacific Railroad at Cheyenne. (See *U. S.* v. *Union Pacific Railway Co.,* (1893) 148 U. S. 562.) The Kansas Pacific was completed from Kansas City to Denver on September 1, 1870, and the Denver Pacific, connecting the Kansas Pacific with the Union Pacific, was completed and opened January 1, 1871.* On account of the change of route just mentioned, the Central Branch of the Union Pacific—the name given to the line through Atchison, Kansas, to meet the Kansas City line as it proceeded in a northwesterly direction from Kansas City to the one hundredth meridian—was left without connection, its subsidy in Government bonds having been limited to one hundred miles by Section 13 of the Act of July 1, 1862.

In another particular the railroad construction contemplated by the Act of July 1, 1862, was modified, for, under authority of the President, the Sioux City line was also changed in its course so as to meet the Union Pacific line at Fremont, Nebraska, about forty-two miles west of Omaha, instead of at the one hundredth meridian.

*The Union Pacific Railway Company was formed January 24, 1880, by the consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company.

The system as constructed is shown by Map II in the Appendix.

We have thus far dealt with the construction of the Union Pacific portion of the line, and shall now deal with the Central Pacific construction, or, more strictly, the construction at the western end of the line, for that construction was accomplished by two companies organized under the laws of the State of California, (*a*) the Central Pacific Railroad Company already mentioned, and (*b*) the Western Pacific Railroad Company of California.

It has already appeared that the Central Pacific Railroad Company was organized July 28, 1861 (a year before the passage of the Act of Congress of July 1, 1862). The Western Pacific was organized December 13, 1862, under the general railroad law of California, with power to construct a road from a point on the San Francisco and San Jose Railroad, at or near San Jose, to Sacramento and there connect with the road of the Central Pacific Company. Afterwards, the Central Pacific Company assigned to this corporation its rights under the Act of Congress to construct the road between San Jose and Sacramento; and this assignment was ratified by Congress March 3, 1865, "with all of the privileges and benefits of the several acts of Congress relating thereto, and subject to all the conditions thereof". (13 Stat. 504.)

It will be recalled that the Act of July 1, 1862, fixed either San Francisco or the navigable waters of the Sacramento River as the western terminus of the Pacific Railroad. The Central Pacific Railroad Company had been organized to build its line from Sacramento to the eastern boundary of California. As Sacramento is situated on the navigable waters of the river from which it takes its name, the construction of the Central Pacific line from that city woul meet the requirements of the Act. The Western Pacific Railroad Company was organized with a view to the construction of a road which would reach the Pacific Ocean at San Francisco. As early as 1864 there was a railroad connecting San Francisco with San Jose and the aim of the Western Pacific Railroad Company was to connect Sacramento with San Jose, and, therefore, with the road to San Francisco.

We have thus sketched in a general way the construction contemplated or provided for at the western end of the through line, and we may now briefly refer to the completion of the construction of the entire road.

It is established by judicial decision that the road was completed November 6, 1869 (*U. P. R. R. Co.* v. *U. S.*, (1877) 13 Ct. Claims, 401; s. c., (1878) 99 U. S. 402; *U. S.* v. *C. P. R. R. Co.*, (1877) 4 Sawy. 341; 25 Fed. Cas. 354; s. c., (1878) 99 U. S. 449). As early as 1869 the construction of the Union Pacific and the Central Pacific began to overlap, the Central Pacific preliminary construction being then east of Ogden and the westerly construction of the Union Pacific being at least as far as Promontory, fifty-four miles west of Ogden, and the matter of the junction point became the subject of an acute controversy between the companies. Later, whether upon agreement of the companies or not it is unnecessary here to inquire, it was provided in the joint resolution of Congress passed April 10, 1869 (16 Stat. 56) that:

> "The common terminus of the Union Pacific and the Central Pacific Railroads shall be at or near Ogden; and the Union Pacific Railroad Company shall build, and the Central Pacific Railroad Company pay for and own the railroad from the terminus aforesaid to Promontory Summit, at which point the rails shall meet and connect and form one continuous line."

This joint resolution was in anticipation of a meeting of the roads, which actually occurred one month later (May 10, 1869) at Promontory, and then, for the first time, there was a through rail connection between the Missouri River and Sacramento and the navigable waters of the Sacramento River.

Later, by the Act of May 6, 1870 (16 Stat. 121), Congress enacted that:

> "The common terminus and point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company shall be definitely fixed and established on the line of railroad as now located and constructed, northwest of the station at Ogden, and within the limits of the sections of land hereinafter mentioned (here nine sections are described); and said companies are hereby authorized to enter upon, use, and possess

said sections which are hereby granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads."

The point of junction established *de facto* under the Act of May 6, 1870, was five miles west of Ogden, and later (June 13, 1875), the Union Pacific leased this five-mile stretch to the Central Pacific for a term of nine hundred and ninety-nine years at an annual rental of $20,000, and later the Union depot at Ogden came to be owned by the Union Pacific and Central Pacific in equal shares and to be the junction point between the two roads.

Late in the year 1869, the line from Sacramento to San Jose was completed, so that in that year there was rail connection between the Missouri River and San Francisco, and as early as July, 1869, there was regular train and mail service between Sacramento and the Missouri River.

The construction of the line from Sacramento to Ogden, for purposes of operation, was as follows:

Sacramento (via Roseville) to Newcastle	November 1, 1864.
Newcastle to Auburn	May 14, 1865.
Auburn to Colfax	September 11, 1865.
Colfax to Dutch Flat	July 5, 1866
Dutch Flat to Alta	July 11, 1866.
Alta to Cisco	December 3, 1866.
Cisco to Truckee	April 3, 1868.
Truckee to Reno	June 19, 1868.
Reno to Wadsworth	July 22, 1868.
Wadsworth to Winnemucca	October 1, 1868.
Winnemucca to Elko	January 25, 1869.
Elko to Promontory	May 29, 1869.
Promontory to near Ogden	May 29, 1869.

The construction from Sacramento to San Jose, completed in the operative sense of that term, occurred as follows:

Sacramento to Galt	May 15, 1869.
Galt to Stockton	August 14, 1869.
Stockton (via Lathrop and Niles) to San Jose	September 15, 1869.

It will presently appear that in the year 1870 the Central Pacific Railroad Company absorbed the Western Pacific Railroad Company through consolidation authorized by the laws of California, so that in that year the Central Pacific Railroad Company became the owner of the line from Ogden to San Jose.

To bring out clearly the bond-aided Pacific roads west of Ogden, we refer to Map III in the Appendix.

The history of the Central Pacific Railroad Company is fully stated in *California* v. *Central Pacific R. Co.,* (1880) 127 U. S. 1, where the court said (pp. 35-39) :

> "The Central Pacific Railroad Company was constituted by the consolidation of two state corporations of California, but derived many of its franchises and privileges from the Government of the United States. The findings of the court below on this subject are as follows, to wit:
>
> 'That on the 28th day of June, 1861, a corporation was formed and organized, under the laws of the State of California, under the corporate name of the Central Pacific Railroad Company of California. Said corporation was formed for the purpose of constructing, owning and operating a line of railroad and telegraph, commencing at the City of Sacramento in said State and running thence through the Counties of Sacramento, Placer, Sierra and Nevada to the eastern boundary of said State, in the expectation that its proposed railroad would when constructed constitute part of a line of railroad extending from the Missouri River to the Pacific Ocean, which line it was then supposed was about to be constructed under the legislative supervision and authority of the Government of the United States, and which line of railroad was afterwards so constructed.
>
> 'That on or about the 1st day of July, 1862, the Government of the United States undertook to construct, or to cause to be constructed, a line of railroad from the Missouri River to the Pacific Ocean, and to that end Congress passed an Act entitled "An Act to Aid in the Construction of a Railroad from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the Same for Postal, Military, and Other Purposes". See 12 Stat. at L. p. 489.
>
> 'That to facilitate the construction of said road the Government of the United States, by said Act of Congress, conferred upon the said Central Pacific Railroad Company of California the same powers and clothed it with the same privileges and immunities which it conferred upon and clothed the said Union Pacific Railroad Company, except that the said Central Pacific Railroad Company of California was to commence the construction of said railroad at the Pacific Ocean and built east

until it met the said Union Pacific railroad, building west.

'That on or about the 2d day of July, 1864, Congress passed an Act entitled "An Act to Amend an Act Entitled An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government of the United States the Use of the Same for Postal, Military and Other Purposes", approved July 1, 1862. See 13 U. S. Stat. at L. p. 356.

'That said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the terms and conditions of said Act of Congress of July 1, 1862, within the time therein designated.

'That on or about the 31st day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights under the aforesaid Acts to a corporation then existing under the laws of the State of California, and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San Jose and Sacramento, in said State of California. Said assignment was ratified and confirmed by the United States by an Act of Congress passed on the 3d day of March, 1865, entitled "An Act to Amend an Act Entitled An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes, Approved July 1, 1862, and to Amend an Act Amendatory Thereof, Approved July 2, 1864". See 13 U. S. Stat. at L. p. 504.

'That the said line of railroad from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation, and the whole of the railroad mentioned in the said Acts of Congress has long since been completed, and is now, in accordance with the spirit and intent of said Acts of Congress, operated as one continuous line from the Missouri River to the Pacific Ocean, and is so operated and maintained for the uses and purposes mentioned in said Acts.

'That in August, 1870, acting under the said Acts of Congress, said Central Pacific Railroad Company of

California and the said Western Pacific Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said Company is the defendant herein, and has, from the completion of said railroad as aforesaid until the present time, owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said Acts of Congress and for the uses and purposes therein mentioned.'

If we turn to the Acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred on this Company. Originally, the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the State. Congress, by the Act of 1862, authorized the Company (in the words of the Act) 'to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned (the Union Pacific), and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California". Sec. 9. In the following section it was enacted, that, after the completion of its road to the eastern boundary of California, the Central Pacific might unite upon equal terms with the Union Pacific Railroad Company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines through the Territories, from the State of California to the Missouri River, as should then remain to be constructed, on the same terms and conditions as provided in relation to the Union Pacific Railroad Company. Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given, by the Acts of 1862 and the subsequent Acts, to construct a railroad from the Pacific Ocean across the State of California and the federal Territories until it should meet the Union Pacific; which it did meet at Ogden in the Territory of Utah. This important grant, though in part collateral to, was independent of, that made to the Company by the State of California, and has ever since been possessed and enjoyed. The present Company has it by transfer from, and consolidation of, the original companies, by

> which its existence and capacities were constituted. Such consolidation was authorized by the 16th section of the Act of Congress of July 1, 1862, and the 16th section of the Act of July 2, 1864, taken in connection with the second section of the Act of March 3, 1865, referred to in the findings of the court. The last named Act ratified the transfer by the Central Pacific to the Western Pacific of a portion of its road extending from San Jose to Sacramento, and conferred upon the latter company all the privileges and benefits of the several Acts of Congress relating thereto, and subject to all the conditions thereof. If, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden city, were conferred upon it by Congress."

We come now to the construction of the non-bond-aided lines within California.

(3) THE CONSTRUCTION OF THE CENTRAL PACIFIC NON-BOND-AIDED LINES IN CALIFORNIA.

As already appears, the bond-aided lines within the State of California, completed in 1869, commenced with the eastern boundary of the state and extended thence through Roseville, Sacramento, Lathrop and Niles to San Jose. The Central Pacific construction from a point about five miles west of Ogden to Sacramento was 737.50 miles in length; while the line from Sacramento to San Jose was 123.16 miles in length.

We come now to consider three extensions to this bond-aided line: (*a*) from Roseville to the Oregon boundary, 296.50 miles in length; (*b*) from Niles to Oakland, 24.31 miles in length, and (*c*) from Lathrop to Goshen, 146.08 miles in length. These extensions have been generally known as the "non-bond-aided lines". A brief description of their origin and construction is necessary to a full understanding of the case.

(a) Roseville to the Oregon boundary.

The construction of the branch from Roseville to the Oregon boundary was begun by the California and Oregon Railroad Company under legislation adequately described in *Oregon & C. R. Co.* v. *U. S.*, (1915) 35 Sup. Ct. Rep. 908, 911, as follows:

> "By the act of July 25, 1866, *supra* (14 Stat. at L. 239, chap. 242), Congress authorized and empowered the California & Oregon Railroad Company, which had been organized under a statute of the state of California, and such company, organized under the laws of Oregon, as the legislature of that state should designate, to construct and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad in California, as follows: The California & Oregon Company to construct that part of the railroad and telegraph line within the state of California, beginning at a point to be selected by the company on the Central Pacific Railroad in Sacramento Valley, and running thence northerly through the Sacramento and Shasta valleys to the northern boundary of the state. The Oregon company to construct the part in Oregon from Portland south through certain designated valleys to the southern boundary of Oregon, to connect with the part constructed by the first-named company. Whichever company first completed its respective part of the road from the designated terminus to the boundary line between the states was authorized to continue construction until the parts should meet and connect, and the whole line of railroad and telegraph should be completed."

As we shall presently see, the California and Oregon Railroad was absorbed by the Central Pacific Railroad August 22, 1870, under articles and proceedings for consolidation.

The construction of the line from Roseville north occurred as follows:

Roseville to Wheatland	October 28, 1867.
Wheatland to Yuba	September 19, 1868.
Yuba to Marysville	June 1, 1869.
Marysville to Chico	July 2, 1870,
Chico to Tehama	August 28, 1871.
Tehama to Red Bluff	December 6, 1871.
Red Bluff to Redding	September 1, 1872.
Redding to Delta	September 1, 1884.
Delta to Oregon State Line	October 5, 1887.

(b) Niles to Oakland.

The road from Niles to Oakland, thereby effecting communication with San Francisco, was finished in 1869 as follows:

Niles to Alameda Wharf.....September 8, 1869.
Alameda Wharf to San Francisco (boat line)December 1, 1869.

This construction was by the San Francisco, Oakland and Alameda Railroad Company, which was absorbed by the Central Pacific Railroad Company in the consolidation of August 22, 1870. (P. Ex. 12, IV R. 1281.)

(c) Lathrop to Goshen.

This extension of 146.08 miles was built by the San Joaquin Valley Railroad Company (P. Ex. 12, IV R. 1282), a company which was absorbed by the Central Pacific in the consolidation of August 22, 1870, as follows:

Lathrop to Modesto.....November 8, 1870.
Modesto to Merced.....January 25, 1872.
Merced to Fresno..... May 28, 1872.
Fresno to Goshen.....August 1, 1872.

It now appears that the bond-aided lines in California were constructed by (*a*) the Central Pacific, and (*b*) the Western Pacific, and that the three non-bond-aided lines were constructed by the companies following: (*a*) Roseville to the Oregon boundary, by the California and Oregon Railroad Company; (*b*) Niles to Oakland, by the San Francisco, Oakland and Alameda Railroad Company, and (*c*) Lathrop to Goshen, by the San Joaquin Valley Railroad.

All this construction became the property of the Central Pacific Railroad Company, for on June 23, 1870, the Central Pacific Railroad Company of California consolidated with the Western Pacific Railroad Company under the corporate name of Central Pacific Railroad Company (P. Ex. 12, IV R. 1278), and on August 22, 1870, it consolidated with (*a*) the California and Oregon Railroad Company, builder from Roseville to the Oregon boundary; (*b*) the San Francisco, Oakland and Alameda Railroad Company, builder from Niles to Oakland, and

(*c*) the San Joaquin Valley Railroad Company, builder from Lathrop to Goshen.

It thus appears that the Central Pacific Railroad Company became on August 22, 1870, the owner of all the "bond-aided" and "non-bond-aided" lines which the Central Pacific Railway Company now owns within the State of California, though all of the lines had not then been constructed.

The mileage, built and projected, thus vested in the Central Pacific Railroad Company in consequence ofthe consolidation was as follows:

Original Company.	Between.	Miles of Road.
	Bond-aided roads.	
Central Pacific Railroad.....	Sacramento to 5 miles west of Ogden.....	737.50
Western Pacific Railroad....	San Jose to Sacramento	123.16
	Non-bond-aided roads.	
San Francisco, Oakland and Alameda Railroad.....	Niles to Oakland.....	24.31
California and Oregon Railroad	Roseville to Oregon line	296 50
San Joaquin Valley Railroad..	Lathrop to Goshen.....	146.08
Total Central Pacific Railroad Company, consolidated	.....	1,327.55

The location of the road and the extensions dealt with will more fully appear by reference to Map IV in the Appendix.

Before passing from the connection of the Central Pacific with the construction of the bond-aided and non-bond-aided lines, it is well to note that the line from Lathrop to Goshen was built by the same associates as those who were in control of the Central Pacific, for it appears (P. Ex. 12, IV R. 1281) that the directors named in the articles of incorporation were Leland Stanford, Mark Hopkins, Charles Crocker, Edwin B. Crocker (brother of Charles) and C. P. Huntington.

We pass now to the construction of the Southern Pacific Railroad Company.

(4) THE HISTORY OF THE SOUTHERN PACIFIC RAILROAD COMPANY FROM ITS INCORPORATION IN 1865, INCLUDING ITS ACCEPTANCE ON NOVEMBER 30, 1866, OF THE GRANT MADE TO IT BY THE ATLANTIC AND PACIFIC ACT OF JULY 27, 1866, AND ITS ACCEPTANCE ON APRIL 3, 1871, OF THE GRANT MADE TO IT BY THE TEXAS PACIFIC ACT OF MARCH 3, 1871, AND THENCEFORWARD UNTIL ITS ROAD REACHED YUMA OCTOBER 22, 1877.

The Southern Pacific Railroad Company was incorporated December 2, 1865, to build a line of railway in as direct a route as was feasible considering topography, etc., from San Francisco to the town of San Diego, "thence eastward through the county of San Diego to the eastern line of the State of California, there to connect with the contemplated road from the eastern line of the State of California to the Mississippi River." At this time

> "no authority had been given by Congress for the construction of any railroad from the Mississippi River to the eastern line of the state of California; although the thirty-third and thirty-fifth parallels of latitude had been publicly discussed as probable lines of future railroads, and it was, therefore, uncertain at what point of the line any road to be projected and constructed would intersect the eastern line of the state."
>
> *Southern Pac. R. Co.* v. *Orton,* (1879) 6 Sawy. 157, 32 Fed. 457, 460.

The road which the Southern Pacific contemplated to build was to run through the Santa Clara and Pajaro Valleys, thence by way of a pass through the Coast Range along the west side of the San Joaquin Valley, by as direct a route as the circumstances would allow, to the town of San Diego, which lies 32° 40′ north. The contemplated route is indicated on Map V in the Appendix. An easterly line would take it to a point in California on the Colorado River opposite Yuma, which lies 32° 40′ north.

So much for the route mentioned in the articles of incorporation of December 2, 1865.

Next came the Atlantic and Pacific Act of July 27, 1866,

providing for a railroad from Springfield, Missouri, to the Pacific Coast (14 Stat. 293). This line was to be built "along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railroad route, to the Colorado River, at such point as may be selected by said company for crossing (into the State of California); thence by the most practicable and eligible route to the Pacific". The line of definite location filed by the company laid out a route which crossed the Colorado River at Needles (34° 50′ north); thence across California to San Buenaventura (now Ventura) which lies 34° 17′ north. (See *United States* v. *Southern Pac. R. Co.* (1892) 146 U. S. 570; *Southern Pac. R. Co.* v. *United States* (1897) 168 U. S. 1.)

The Act authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific "at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco" (Sec. 18). The authority conferred by this Act and the land grant therein contained caused the Southern Pacific Railroad Company to alter the line of its railroad so that instead of building south to the town of San Diego (as provided in its articles of incorporation) it deflected its route so as to reach the Colorado River near the thirty-fifth parallel, namely, at Needles, which lies 34° 50′ north.

In accepting the grant, the Southern Pacific Railroad Company filed a map in the Department of the Interior on January 3, 1867, changing its route as above stated. By an act of the Legislature of California passed April 4, 1870 (Stats. Cal. 1869-70, p. 883), it was provided that notwithstanding the line named in its articles of incorporation of December 2, 1865, the Southern Pacific Railroad Company was "authorized and empowered to change the line of its railroad so as to reach the eastern boundary of the State of California by such route as the company shall determine to be the most practicable and to file new and amendatory articles of association", etc.

On June 28, 1870, Congress passed a joint resolution (16 Stat. 382), which provided "that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be on the route indicated by the map filed

by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven".

Under the terms of the Atlantic and Pacific Act, the Southern Pacific was required to build fifty miles of road before July 27, 1868, and fifty miles additional each year thereafter. By the act of July 25, 1868 (15 Stat. 187), Congress extended the time for the construction of the Southern Pacific line, requiring the completion of the first thirty miles by July 1, 1870, and subsequent construction of at least twenty miles annually.

The first thirty miles was constructed by the Southern Pacific Railroad Company under the name of the Santa Clara and Pajaro Valley Railroad, by July 1, 1870, the construction being from San Jose to Gilroy, a distance of thirty miles; and the second item of construction was finished by June 30, 1871, by the building of the road from Gilroy to Tres Pinos, a distance of twenty miles. The remainder of the construction of the Southern Pacific was from Goshen south,* and the first section of twenty miles from Goshen south, mentioned in the testimony of Strobridge (II R. 402), was completed by July 1, 1872. The construction periods of the line from Goshen to Mojave occurred as follows:

Goshen to Tipton	July 25, 1872.
Tipton to Delano	July 14, 1873.
Delano to Sumner	October 26, 1874.
Sumner to Caliente	April 26, 1875.
Caliente (over Tehachapi) to Mojave	August 9, 1876.

The construction from Mojave to Needles, a distance of two hundred and forty miles, was finished June 22, 1883 (II R. 421), but, as that stretch of the road became the property of the Atchison, Topeka and Santa Fe long before the commence-

*The original projected line of the Southern Pacific Railroad was to Tres Pinos, thence through the Coast Range to Goshen, and thence southerly. The line was built to Tres Pinos as above shown. A branch line was also built westwardly from Goshen via Huron to Alcalde, a distance of sixty-one miles. The line, of course, was surveyed between Tres Pinos and Alcalde but never built because the country was too forbidding. (Hood, II R. 456; Kruttschnitt, II R. 799-800; see also *Californina* v. *Central Pac. R.* Co., (1888) 127 U. S. 1, 42, which mentions the unfinished section between Tres Pinos and Huron.) Furthermore, there was other construction, and lines to San Francisco, both built and projected, which more than answered the requirements of the situation.

ment of this action, the details of the construction were not offered in evidence.

Speaking of the Atchison, Topeka and Santa Fe, Mr. Kruttschnitt said (II R. 761):

> "Their advent to Southern California was marked by a lease from the Southern Pacific Railroad of the line from Needles to Mojave. . . . It was prior necessarily, to the early part of 1883, because their line was opened at that time. That line was leased to them up to, I think, 1911, when it was sold to them."

We shall now pass from the construction under the Atlantic and Pacific grant to the Texas Pacific Act of March 3, 1871, and the action taken thereunder.

In the meantime, however, it is important to note that although there is no proof in terms of the interest of Leland Stanford, C. P. Huntington, Mark Hopkins and Charles Crocker in the Southern Pacific Railroad Company until 1870, nevertheless it is clearly to be inferred that they were interested in this company before that year, for the record contains the following self-explanatory letter written by Mr. Huntington to the Secretary of the Interior September 25, 1868 (D. Ex. 23, V R. 1704):

"Office
CENTRAL PACIFIC R. R.
of California.
No. 54 William Street

C. P. Huntington, V. P.
NEW YORK, Sept 25 1868.

Hon. O. H. BROWNING
Secretary of the Interior
Washington, D. C.

DR SIR

Herewith I have the Honor to hand you the Annual Report of the Southern Pacific Railroad Company as required by the Acts of Congress in relation thereto & of which please acknowledge the receipt.

Resply Yours
C. P. HUNTINGTON"

This letter was received by the Department of the Interior on September 26, 1868, and is endorsed as having been received that day from C. P. Huntington, New York City (D. Ex. 23, V R. 1706). The report enclosed in the letter was required by the Act of June 25, 1868, 15 Stat. 79 (P. Ex. 7, IV R. 1262).

On October 12, 1870, the Southern Pacific Railroad Company was consolidated under the laws of California with three other companies; (*a*) San Francisco and San Joaquin Railroad Company, the owner of the constructed railroad from San Francisco to San Jose, fifty miles; (*b*) Santa Clara and Pajaro Valley Railroad Company, the owner of the constructed road from San Jose to Gilroy, thirty miles, and (*c*) California Southern Railroad Company, organized to construct a railroad from Gilroy to Salinas, Monterey County, California. As already stated, this consolidation became effective and a matter of public record in California October 12, 1870. By that public record it became known, and was the fact, that the directors of the Southern Pacific Railroad Company were Lloyd Tevis, Leland Stanford, Charles Crocker, C. P. Huntington, Mark Hopkins, Charles Mayne, and Peter Donahue. It is desirable at this moment to point out the relation which Stanford, Huntington, Hopkins and Crocker bore then to the railroad situation in California. They were the presumptive owners, being then in control, of the three roads in California authorized to run to the boundaries of the State; (*a*) the Central Pacific, crossing to Ogden; (*b*) the Roseville road to the Oregon line, and (*c*) the Southern Pacific Railroad Company, authorized to meet the Atlantic and Pacific at Needles so that it might connect the Atlantic and Pacific with its (the Southern Pacific's) line to San Francisco (Act of July 27, 1866; 14 Stat. 292, Sect. 18).

It is in the light of these facts that we are next to consider the Texas Pacific Act of March 3, 1871.

On March 3, 1871, Congress passed an act (16 Stat. 573) to incorporate the Texas Railroad Company with authority and power to construct a railroad

> "from a point at or near Marshall, county of Harrison, State of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-

second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ship's channel in the bay of San Diego, in the State of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude."

In *United States* v. *Southern Pacific R. Co.,* (1892) 146 U. S. 570, 572, 574, it is said:

> "On March 3, 1871, Congress passed an Act (16 Stat. at L. 573) to incorporate the Texas-Pacific Railroad Company, and to aid in the construction of its road, the 23d section of which Act reads:
>
> 'That for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California by the Act of July 27, 1866; *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company'.
>
> . . . . . .
>
> On April 3, 1871, just a month after the passage of the Act of March 3, the defendant, the Southern Pacific Company, filed a map of its route from Tehachapa Pass by way of Los Angeles to the Texas Pacific railroad, and proceeded to construct its road, and finished the entire construction some time during the year 1878."

The Texas Pacific filed its map of general route in August, 1871. (*Southern Pacific R. Co.* v. *U. S.,* (1903) 189 U. S. 447, 449.)

The acceptance was made on behalf of the Southern Pacific

by Charles Crocker, its president, as follows (P. Ex. 76, IV R. 1673-4):

"To Hon. C. Delano, Secretary of the Interior, and Hon. Willis Drummond, Commissioner of General Land Office.

Please to take notice that this Map is filed by the Southern Pacific Railroad Company of California in the office of the Commissioner of the General Land Office in the Department of the Interior for the purpose of designating by the heavy red line traced thereon, the general route of the line of Railroad as near as may be 'from a point at or near Tehatchapa Pass, by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River', adopted by the said Southern Pacific Railroad Company in pursuance of the power and authority granted to said company by the 23d Section of the Act of Congress of the United States entitled 'An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes'. Approved March 3d, 1871, and in pursuance of the provisions of the Act of July 27th, 1866, referred to in said 23d Section, and for the purpose of obtaining the benefit of the provisions of said Acts of Congress.

CHAS. CROCKER,
President Southern Pacific Railroad Company."

"DEPARTMENT OF THE INTERIOR

WASHINGTON, D. C.

April 3d, 1871.

SIR:

The 23d section of the Act to incorporate the Texas Pacific Railroad, and for other purposes, approved March 3d, 1871, authorizes 'the Southern Pacific Railroad Company to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado River', with the same rights and privileges, and subject to the same limitations and restrictions, as were granted to said Southern Pacific Railroad Company of California, by the Act of July 27, 1866.

The accompanying map designating the route of said road from Tehachapa Pass, by way of Los Angeles to the Colorado river, has been filed by Charles

Crocker Esq. President of the Company, with a request, that the lands may be withdrawn, as provided in the 12th Section of said Act, 'from preemption, private entry and sale'.

You will issue the necessary order for a withdrawal of the lands, within twenty miles, and along the route designated on said map.

Very respectfully,

Your Obt. Servant

WALTER H. SMITH,

Acting Secretary.

Hon. WILLIS DRUMMOND
Commissioner of the
General Land Office."

It is to be noted that the Texas Pacific was to cross the Colorado River into California in the southeastern portion thereof as near as might be to the thirty-second parallel. The point answering to this requirement was agreed to be Yuma, which is situated 32° 40′ north of the Colorado River in Arizona opposite the southeast corner of California. The construction of the Southern Pacific Railroad Company from Goshen to Mojave passed through Tehachapi Pass, as will be observed by reference to the table at page 24 of this brief. The Act of March 3, 1871, authorized the Southern Pacific Railroad Company to construct "from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river". The construction referable, therefore, to the Texas Pacific act and grant may be said to be from Mojave to Yuma, via Los Angeles, and this construction occurred at the times mentioned in the following table, which is arranged geographically and not chronologically, as follows:

Mojave to Tunnel	September 6, 1876.
Tunnel to San Fernando	January 1, 1876.
San Fernando to Los Angeles	April 15, 1874.
Los Angeles to Spadra	April 15, 1874.
Spadra to Colton	July 16, 1875.
Colton to Indio	March 29, 1876.
Indio to Colorado River *near Yuma*	May 23, 1877.
Yuma	October 22, 1877.

A clear understanding of the construction by the Southern Pacific Railroad Company under (*a*) The Atlantic and Pacific Act, and (*b*) the Texas Pacific Act, may be had by reference to Map VI in the Appendix.

In reading the map, it will be remembered that the construction from Goshen via Tehachapi Pass to Mojave, thence to Needles, was under the Atlantic and Pacific grant, and that the construction from Mojave via Los Angeles to Yuma was under the Texas Pacific grant.

We have aimed to give a brief but adequate history of the legislation under which the Southern Pacific Railroad Company became a corporation and built the road with which we are dealing in this action. It may be helpful, however, here to quote the history of that legislation set down in an exhaustive way in *Southern Pacific Railroad Co.* v. *Orton,* (1879) 6 Sawy. 157, 32 Fed. 457, decided by Judge Sawyer, as follows:

> "The Southern Pacific Railroad Company became duly incorporated under the general statute of the state of California of 1861, providing for the incorporation of railroad companies, (St. 1861, 607) by filing its articles of association in the office of the secretary of state on December 2, 1865. The act requires, among other things, the articles of association to state 'the place from and to which the proposed road is to be constructed, and the counties into and through which it is intended to pass, and its length as near as may be'. *Id.* 608, Sect. 2" (p. 459).
>
> "The said articles of association, filed December 2, 1865, set forth that the corporation was formed 'for the purpose of constructing, owning, and maintaining a railroad from some point on the bay of San Francisco, in the state of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego, in said state; thence eastward, through the said county of San Diego, to the eastern line of the state of California, there to connect with a contemplated railroad from the eastern line of the state of California to the Mississippi river'. . . . At this time, also, no authority had been given by congress for the construction of any railroad from the Mississippi river to the eastern line of the state of California; although the thirty-third and thirty-fifth parallels of latitude had been publicly discussed as probable lines of future railroads, and it was, therefore, uncertain at what point of the line any road to be projected and constructed would intersect the eastern line of the state.

This being the condition of things, congress, on July 27, 1866, passed 'An act granting lands to aid in the construction of a railroad and telegraph line from the state of Missouri to the Pacific coast'. 14 Stat. 294. By the first section, the Atlantic & Pacific Railroad Company was incorporated and authorized to construct a railroad from the town of Springfield, in the state of Missouri, to the western boundary line of the state; thence 'to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific.' Section 3 provides as follows: 'And be it further enacted that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, . . . every alternate section of public land . . . not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land-office. . . .' . . . And section 18 is as follows: 'And be it further enacted that the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad, herein provided for.'

In pursuance of the third section of the said act of congress, the Southern Pacific Railroad Company filed a plat of the line of railroad adopted by it in the office of the commissioner of the general land-office on the third day of January, 1867. The line as laid down on the plat filed, commenced at a point near the southern end of the bay of San Francisco, and passes through the counties of Santa Clara, Monterey, Fresno, Tulare,

Los Angeles (as the counties of Tulare and Los Angeles were constituted when the company was incorporated), and San Bernardino to the Colorado river, to a point on the river near where the thirty-fifth parallel of latitude crosses said river; thus passing through all the counties named in the certificate of incorporation except San Luis Obispo, which was avoided by a deflection to the eastward, and San Diego, which the line did not go far enough south to reach. The deflection carried the line through Fresno and San Bernardino, instead of San Luis Obispo and San Diego counties, but it passes through all the other counties named in the articles of incorporation. The northern portion of Los Angeles county through which the line passed, as the county was constituted at the date of filing the articles of association, is now the southern part of Kern county. Before the filing of said plat the road had not been finally located, and no map or profile thereof had been filed in the office of the secretary of state of the state of California, as provided by section 43 of the act under which it was incorporated, (St. 1861, 623); the only designation at the time being that indicated in the articles of incorporation hereinbefore set out (pp. 460-462).

"On July 25, 1868, Congress passed an act extending the time within which the Southern Pacific Railroad Company should be required to complete the first 30 miles of its road, and requiring it thereafter to complete 20 miles each year till the completion of the road within the time required. 15 St. 187. On June 28, 1870, congress passed a joint resolution, as follows, to-wit: 'That the Southern Pacific Railroad Company of California may construct its road and telegraph lines, as near as may be, on the route indicated by the map filed by said company, in the department of the interior, on the third day of January, 1867; . . . ' 16 St. 382" (p. 462).

"On March 3, 1871, congress passed the act to incorporate the Texas Pacific Railroad Company, in which it authorized the plaintiff, the Southern Pacific Railroad Company, to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same rights, etc., as given to it by the act organizing the Atlantic & Pacific Railroad Company, 16 St. 573.

On March 1, 1870, the legislature of California passed

a general act authorizing any corporation organized or to be organized under the laws of the state to amend its articles of association, by making and filing amended articles in the same office where the originals are to be filed. St. 1869-70, 107.

On April 4, 1870, the legislature of California passed an act as follows: 'Whereas, by the provisions of a certain act of congress of the United States of America, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California," approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers, and authority were vested in and conferred upon, the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of congress, and all other acts of congress now in force or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association; and the right, power, and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said acts of congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges and franchises, power and authority conferred upon, granted to, or vested in said company by the said acts of congress, and any act of congress which may be hereafter enacted.'

Subsequent to the filing of said plat, on January 3, 1867, and prior to the issue of the patent to the land in question, the legislature of California passed various other acts recognizing and granting rights to the Southern Pacific Railroad Company. Under section 40 of the act under which plaintiff was incorporated, it was authorized to consolidate with any other railroad corporation. St. 1861, 622.

On October 12, 1870, in pursuance of the general statute, the San Francisco & San Jose Railroad Company, then owning and operating a road from San Fran-

cisco through San Mateo county to San Jose, in Santa Clara county, together with other companies, consolidated with the said Southern Pacific Railroad Company, taking the name of the main and principal company, the Southern Pacific Railroad Company, by which consolidation the Southern Pacific Railroad Company acquired the railroad extending from San Jose to San Francisco; thereby connecting its line as laid down on the plat filed with the commissioner of the general land-office with the city of San Francisco.

On April 15, 1871, in pursuance of the said general act of the legislature of California, approved March 1, 1870, the said Southern Pacific Railroad Company filed amended articles of association, which articles, among others, contained the following recitals: 'Whereas, by an act of the legislature of the state of California, entitled "An act relating to certificates of incorporation," approved March 1, 1870, any corporation then organized, or thereafter to be organized, under the laws of the state of California, is authorized and empowered to amend its articles of association, or certificate of incorporation, by a majority vote of the board of directors or trustees, and by a vote or written assent of the stockholders representing, at least, two-thirds of the capital stock of such corporation; and, whereas, by a certain other act of the legislature of the state of California, entitled "An act to aid in giving effect to an act of congress, relating to the Southern Pacific Railroad Company," approved April 4, 1870, to enable the said company to more fully and completely comply with and perform the provisions, requirements, and conditions of an act of congress of the United States of America, entitled "An act granting land to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California," approved July 27, 1866, and of all other acts of congress then in force, or which might thereafter be enacted, the said Southern Pacific Railroad Company, its successors and assigns, were authorized and empowered to change the line of its railroad, so as to reach the eastern boundary line of the state of California, by such route as said Company might determine to be most practicable, and to file new and amendatory articles of association: . . . now, therefore, the board of directors of said Southern Pacific Railroad Company do order and direct

> that the articles of association of said company be amended so as to read as follows,' etc. The object of the corporation as expressed in its amended articles is as follows: 'Art. 2. The object and purpose of said new corporation shall be to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado river, in the south-eastern part of the state of California, a distance of seven hundred and twenty miles, as near as may be; also, a line of railroad from a point at or near Taheechaypah pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, a distance of three hundred and twenty-four miles, as near as may be; also, a line of railroad from the town of Gilroy, in the county of Santa Clara, in said state, passing through said county, and the counties of Santa Cruz and Monterey, to a point at or near Salinas City, in said last-named county, a distance of forty-five miles, as near as may be; also, such branches to said lines as the board of directors of said new corporation may hereafter consider advantageous to said corporation, and direct to be established' " (pp. 462-464).

Before we pass to a consideration of the construction by the Southern Pacific of its line from Yuma to New Orleans, covering the period from 1877 to 1883, we desire to have it particularly noted that the Texas Pacific Act was passed by Congress presumably with full knowledge of the fact that the grant to the Southern Pacific, authorizing the connection with the Texas Pacific, gave to Leland Stanford, C. P. Huntington, Mark Hopkins and Charles Crocker, who were then publicly known to be in control of both the Central Pacific and the Southern Pacific, all lines (four in number) leading to San Francisco and crossing the boundaries of the State of California. These lines were (1) the line crossing to Nevada and Utah for connection with the Union Pacific; (2) the line from Roseville to the Oregon boundary there to connect with roads leading to Portland and the north; (3) the connection from Mojave and Needles over the thirty-fifth parallel to Springfield,

Missouri, and (4) the connection on the thirty-second parallel, at Yuma, leading to Marshall, Texas.

Before passing on we also invite the attention of the court to the fact that these associates were in open control of the companies. They appeared in control of the boards of directors in the consolidations which took place in the year 1870—those of the Central Pacific June 23, 1870, and August 22, 1870, and that of the Southern Pacific Railroad Company October 22, 1870.*

In view of these facts, great significance attaches to the circumstance that by the terms of the act the Texas Pacific Railroad Company was forbidden to effect any consolidation with a competing through line, *while no such limitation was imposed upon the Southern Pacific Railroad Company.*

Section 4 of the Act of March 3, 1871, reads in part:

> ". . . the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, State, or territorial authority, on the route prescribed in the first section of this act; *but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.*"

Section 23 of the Act of March 3, 1871, authorizing the Southern Pacific to construct a connecting line by way of Tehachapi Pass, contains no similar limitation upon the South-

*In Defendants' Exhibit No. 23 (V. R. 1706), containing the annual report of the Southern Pacific Railroad Company (of California) to the Secretary of the Interior, *for the year ending June 30, 1871,* the directors of the Southern Pacific Railroad Company are named as: Charles Crocker, Leland Stanford, C. P. Huntington, Mark Hopkins, Peter Donahue, Lloyd Tevis, Charles Mayne. The exhibit also contains the statement of C. P. Huntington, on oath, taken September 30, 1871, that he was elected to the office of President of the Southern Pacific Railroad Company of California on the 14th day of August, 1871, in the place of Charles Crocker whose term of office expired on that day. The significance of this should be borne in mind. See also p. 28 for Charles Crocker's letter, in which as President of the Southern Pacific Railroad Company, he makes acceptance of the terms of the Texas Pacific Act.

ern Pacific Railroad Company. By this section the Southern Pacific is given the same rights, grants and privileges, and is subject to the same limitations, restrictions and conditions as were granted to it by the Act of July 27, 1866, authorizing the Atlantic and Pacific construction. In the Act of 1866 there is no limitation imposed upon the right of the Southern Pacific to consolidate.

(5) THE HISTORY OF THE SOUTHERN PACIFIC SUNSET-GULF LINE FROM THE COMPLETION OF THE ROAD TO YUMA, OCTOBER 22, 1887, UNDER THE TEXAS PACIFIC ACT, TO THE OPENING OF THE LINE TO NEW ORLEANS FEBRUARY 1, 1883.

We come now to the construction of the line from Yuma to New Orleans.

The Southern Pacific Railroad Company of Arizona was incorporated September 20, 1878, to build a railroad connecting with the Southern Pacific Railroad Company of Califonia at Yuma and running "thence eastwardly following as near as practicable the thirty-second parallel of north latitude to the eastern boundary of said Territory." In the same year it commenced building eastward from Yuma and continued its construction work, with the exception of a few months' interruption in the vicinity of Casa Grande in 1879, until the line reached the eastern boundary of Arizona. From there the work was carried on by the Southern Pacific Railroad Company of New Mexico, incorporated April 14, 1879, to construct a railroad across that portion of "the Territory of New Mexico between its western boundary and the Rio Grande," following as near as practicable the thirty-second parallel. The line built by this company extended to the Texas boundary at El Paso.

The road in Texas was built by two companies, the Galveston, Harrisburg and San Antonio Railroad Company, which built the line from El Paso to Houston, and the Texas and New

Orleans Railroad Company, which built the section between Houston and the Louisiana boundary. The construction as far as San Antonio, under the name of the Galveston, Harrisburg and San Antonio Railroad Company, was a continuation of the construction under Southern Pacific control. The work was done by two construction parties, one working eastward from El Paso and one westward from San Antonio, both of which were under the supervision of William Hood, the Engineer of the Southern Pacific Company. Connection was made at the Pecos River in Texas on Christmas Day, 1882. (Strobridge, II, R. 404-5; Martin, II, R. 418-19; Hood, II, R. 435.) The construction of the Galveston, Harrisburg and San Antonio line from San Antonio east to Houston was accomplished under the management and control of T. W. Pierce (Hopkins, II, R. 674).

The remainder of the present Sunset line was constructed and owned by the Louisiana Western Railroad Company and by the Morgan, Louisiana and Texas Railroad Company prior to the completion of the construction work in Texas. These lines having been leased and the junction betweeen east and west having been effected at the Pecos River in the winter of 1882, the line from Yuma to the Gulf was ready for operation and was opened February 1, 1883.

It appears from this that the route from California to New Orleans was made up of the lines of seven companies; three named Southern Pacific Railroad Company, viz., of California, Arizona and New Mexico; two Texas railroad corporations and two Louisiana railroad corporations.

The companies and the sections owned by them appear in the following table, taken in part from the testimony of Mr. Kruttschnitt (II, R. 724):

S. P. R. R. Co. of Cal.	San Francisco to Yuma.
" " Ariz.	Yuma to New Mexico line.
" " N. M.	New Mexico line to El Paso.
G. H. & S. A.	El Paso to Houston.
T. & N. O.	Houston to Orange.
La. W.	Orange to Lafayette.
Morgan Line (L. & T. R. & S. Co.)	Lafayette to New Orleans.

The following table shows the construction in periods of the Sunset route from Yuma to New Orleans:

Yuma to Casa Grande	May 15, 1879,	S. P. R. R. Co. of Ariz.
Casa Grande to Tucson	March 17, 1880,	" "
Tucson to New Mexico line	Sept. 15, 1880,	" "
New Mexico line to Rio Grande Bridge	Oct. 18, 1880,	" of N. M.
Rio Grande Bridge to El Paso	April, 1881,	G. H. & S. A. R. R. Co.
El Paso to Pecos to San Antonio	Jan'y 15, 1883,	"
San Antonio to Luling	March 1, 1877,	"
Luling to Columbus	1874,	"
Columbus to Harrisburg (via Houston)	(Before 1870),	"
Houston to Orange	(Built before Civil War but damaged and subsequently constructed as follows:)	
Houston to West Liberty	Before Jan'y, 1870,	T. & N. O. R. R. Co.
West Liberty to Orange	Aug. 1, 1876,	"
Orange to Vermillionville (Lafayette)	August, 1880,	L. W. R. R. Co.
Vermillionville (Lafayette) to Berwick Bay (Morgan City)	1880,	M. L. & T. R. R. Co.
Berwick Bay (Morgan City) to Bayou Boeuf	Apr. 12, 1857,	N. O. Ope. & G. W. R. R. Co.
Bayou Boeuf to Lafourche	March 1, 1856,	"
Lafourche to Algiers (New Orleans)	Nov. 6, 1854,	"

(6) THE OPERATION OF ALL THE SOUTHERN PACIFIC LINES BY THE CENTRAL PACIFIC, COMMENCING WITH THE CONSTRUCTION SOUTH OF GOSHEN IN 1872 AND ENDING APRIL 1, 1885.

It will be remembered that in the consolidation of the Southern Pacific Railroad Company and other roads already mentioned (p. 26, *supra*) the Southern Pacific became the owner of the line from San Francisco to San Jose, and that this line was extended from San Jose to Gilroy and from Gilroy to Tres Pinos (p. 24, *supra*). All of this construction was west of the Coast Range, whereas the other construction with which we have to deal, commencing with Goshen and south thereof, was east of the Coast Range. We propose now to show that as fast as the Southern Pacific built south of Goshen and the road was in order for operation, it was taken over by the Central Pacific Railroad Company and operated, so that at no moment of time until 1885 was any part of this construc-

tion of the Southern Pacific operated except by the Central Pacific Railroad Company.

William Hood, Chief Engineer of the Southern Pacific Company since 1885 (II R. 395), entered the employ of the Central Pacific May 3, 1867 (II R. 431), and, with the exception of about a year, 1873-1874 (II R. 434), continued in its employ until 1885, when the Southern Pacific Company became the operating company of the system, and he thenceforward, down to the present, has maintained the same relation to the Southern Pacific Company that he had maintained before that time to the Central Pacific.

In his testimony (II R. 431-440) it is shown that the Southern Pacific construction was directed by Messrs. Stanford, Huntington, Hopkins and Crocker, notably by the latter, and that as fast as the construction south from Goshen took place the road was taken over for operation and thenceforward operated by the Central Pacific Railroad Company as a leased line.

Mr. Hood's testimony is as follows (II R. 434-435):

> "The construction south from Goshen—which at the time we built there had no name of Goshen, but was simply a point selected for the Southern Pacific Railroad from the west to turn south—continued consecutively, without cessation, and without any special line of demarcation, other than I have mentioned, to Tipton, which, I think, is about twenty miles south of Goshen, and there the construction ceased for that year; and in the early summer of 1873 I went east on private business. until July, 1874, and when I arrived back again, to go to work again, the track had just reached Bakersfield. I then took active charge of the location of the road from Bakersfield over Tehachapi Pass and south, including charge of construction as well, in the sense of going over it constantly in an advisory capacity, as I was appointed, during the progress of that work, assistant chief engineer of the Southern Pacific Railroad, and essentially acted for the chief engineer in most particulars.
>
> This continued until some time in September, 1876, at which time the road was completed through to San Fernando station, now known, I think, as Fernando station. There was then a stretch of road already com-

pleted by a separate organization under the orders of the chief engineer, which extended from Fernando to Indio, and with which I had no personal connection, excepting that occasionally I had gone over it on trips with Mr. Charles Crocker, who was, of course, in charge of that, as of other similar matters on the Southern Pacific Railroad.

At Indio I commenced with the location of the line and carried it through to Yuma; and, without going into too many details as to other pieces of work here and there—which I can describe at length if desired—the track reached Yuma in the late summer of 1877 or thereabouts.

Construction was recommenced at Yuma in the late fall of 1878, and was carried on continuously eastward, with the exception of a few months lay-off in the summer of 1879, in the vicinity of Casa Grande; and the construction from the west was carried eastward to join the construction being carried westward from San Antonio at a point about ten miles west of the crossing of Pecos River, the tracks having joined there in the fall of 1882. In the meantime construction had been pushed westward from San Antonio, and I had made the preliminary surveys for it.

Q. For that road west of San Antonio?

A. West of San Antonio; by going to San Antonio at a certain period and working west.

Q. Yes.

A. To join the construction from the west, as above indicated, at a point between Langtry and the Pecos River crossing, to make it specific enough; that construction was done principally under the direct orders of Mr. C. P. Huntington and Mr. James Converse, chief engineer of the Galveston, Harrisburg & San Antonio Railroad, whose efforts of construction, however, were entirely confined to the distance between San Antonio, Texas, and a point perhaps midway between Langtry and Pecos River crossing, it being under my supervision, however, to the extent that, under the direct orders of Mr. Charles Crocker, I would go down there occasionally and revise their line and direct line changes, and approve or veto proposed contracts.

This completed what is known as the Sunset Route as far as San Antonio, Texas. East of San Antonio, Texas, I have no knowledge of it whatever."

Upon the point of its operation, Mr. Hood testified (II R. 436):

> Q. Was this road south of Goshen to Pecos River, or near there, turned over for operation to any company as you completed sections of it?
>
> A. At occasional intervals, as the track laying progressed and the road became ready for operation, say a stretch of 100 miles was completed, the operating organization of the Central Pacific Railroad commenced to operate it, and it continued so consecutively as the construction continued east, as far as I knew anything about it, which was at San Antonio, Texas."

Robert A. Donaldson, age seventy-five years, began his employment with the Central Pacific Railroad Company in November, 1870 (II R. 623); became Assistant General Passenger and Ticket Agent of Central Pacific in December, 1877, and later General Passenger and Ticket Agent of the Central Pacific, which position he continued to hold until April 1, 1885, when the Southern Pacific Company took control of and operated the Central Pacific Railroad Company and its branches, on which date he became an employee of the Southern Pacific Company until his retirement April 30, 1912 (II R. 623).

Mr. Donaldson's testimony is as follows (II R. 624):

> "Q. Do you remember the time when the Southern Pacific Railroad line from Goshen south to Los Angeles and Yuma and beyond, was being constructed?
>
> A. I do.
>
> Q. Do you know what company took over that road for operation when sections of it were completed from time to time?
>
> A. From a point at or near the Goshen station, the Central Pacific Railroad Company operated the lines as they were ready for operation.
>
> Q. The Central Pacific Railroad Company was operating its own lines from the beginning?
>
> A. The Central Pacific Railroad Company operated its own lines during all that time, up to the opening of the line south of Goshen.
>
> Q. How far south, if you know, did the operation of the Central Pacific Railroad Company extend over this line south of Goshen?
>
> A. It extended over its own line to Goshen, and over

the lines of the Southern Pacific Railroad of California, the Southern Pacific Railroad of Arizona, the Southern Pacific Railroad of New Mexico to the Rio Grande, at El Paso, and also over a portion of the line from El Paso, when it was completed—the line from El Paso to San Antonio, say."

He again testified (II R. 625):

"Q. From that time (1882) did the Central Pacific Railroad Company, or its officials, have jurisdiction of the entire line between San Francisco and New Orleans?

A. They did, for a period.

Q. For how long?

A. I think possibly six months or a year's time.

Q. When was that jurisdiction terminated? What was the occasion of it?

A. After the completion of the line to San Antonio and the opening of the line to service to and from New Orleans and from and to El Paso, the road between El Paso and New Orleans was handled by officials of the G. H. & S. A., the Louisiana Western, and the Morgan line. I will not undertake to say just what date that took effect, but my remembrance is that it was either late in 1883 or early in 1884.

Q. I am asking you when the Central Pacific officials exercised jurisdiction over that entire line.

A. They exercised jurisdiction over that entire line from the time it was completed.

Q. When it was opened?

A. When it was opened.

Q. And how long thereafter did they continue to do that?

A. My remembrance is that it was not much over a year, if it was that.

Q. Did they not continue until the Southern Pacific Company took charge of these lines in 1885?

A. The operating officers may have done that, but the general passenger agent did not.

Q. Did not Mr. Towne exercise jurisdiction all the way through to New Orleans until 1885, when the Southern Pacific Company took possession?

A. My recollection is that he did.

Q. You remember when the Southern Pacific Company took possession of these lines?

A. I do.

Q. And thereafter, after the Southern Pacific Company took possession, what was the southern limit of your jurisdiction on the Sunset Line?

A. It ended at the Rio Grande River."

JAMES HORSBURGH, JR., General Passenger Agent of the Southern Pacific Company, Pacific System (II R. 629), entered the service of the Central Pacific as a clerk in the General Passenger Department in May, 1873, and continued in the Passenger Department of the system, first with the Central Pacific Railroad Company, and afterwards with the Southern Pacific Company.

The witness testified (II R. 629-630):

"Q. You remember the construction of the line from Goshen south to Los Angeles, Yuma, El Paso and eastward to New Orleans?

A. I do.

Q. What company first operated that line?

A. The Central Pacific Railroad.

Q. Did it take over sections of the line as they were turned over for operation?

A. As turned over by the construction department.

Q. You had jurisdiction as an official, then, over that line from the time it was operated?

A. From the time it was operated, yes.

Q. Do you remember about when this line to New Orleans was opened for operation?

A. I think about February, 1883.

Q. After it was opened for operation, how far did your jurisdiction extend toward New Orleans?

A. To New Orleans

Q. How long did that jurisdiction continue?

A. I believe until the formation of the Southern Pacific Company and the division of the line into the Pacific system and the Atlantic system in 1885.

Q. Do you remember when you first went over the line, after its opening, to New Orleans?

A. Shortly after its opening I went to Houston and New Orleans to install our system of handling passenger business."

He further testified that all instructions came from Stanford, Crocker, Huntington and Hopkins (II R. 630).

TIMOTHY HOPKINS, adopted son of Mark Hopkins who died March 29, 1878 (II R. 649), entered the service of the Central Pacific Railroad Company as a clerk in 1881. He was elected treasurer of the Central Pacific in 1882, and continued as treasurer and as a director of that company until 1892. He was also a director of the Southern Pacific Railroad Company during that period (II R. 649).

The witness testified (II R. 672):

> "Q. Was there ever any distinction made between the lines of the Central Pacific Railroad Company and the Southern Pacific Railroad Company on account of their ownership? What I mean by that is, were they operated separately or were they operated together, as if they were in one ownership?
>
> The Witness: They were operated as one company; no distinction made as to which line was which."

R. H. PRATT, of San Francisco, was foreman of construction and superintendent in charge of camps for the Central Pacific Railroad Company and was connected in various ways with the construction work from March, 1865, until 1871. From then until 1895, when he retired from service, his duties concerned the operation of trains and traffic management, first as division superintendent at Ogden, later at Wells, and finally as assistant general superintendent at San Francisco.

In his deposition introduced into the record (II R. 475), the witness testified (II R. 480-482):

> "Q. What company built the road south of Goshen?
>
> . . . . .
>
> A. The Southern Pacific.
>
> . . . . .
>
> Q. When any section of that road was open for operation south of Goshen, do you know what company operated the road?
>
> A. Well, the Central Pacific Company operated it until the Southern Pacific was formed.
>
> Q. That is all right. I want to continue along as it was brought in, as these sections were brought in to be operated by the company operating them.
>
> A. The Central Pacific Company.
>
> . . . . .
>
> Q. From the time it was opened, that was about 1885?

A. Down to 1885?
Q. Yes.
A. The Central Pacific Company.
Q. The Central Pacific Railroad Company?
A. Yes, sir.
Q. Do you remember when that line reached El Paso in its progress eastward, about when?
A. I can not remember.
Q. Did the Central Pacific Railroad operate the line to El Paso at any time?
A. It did.
Q. Did it operate the road east of El Paso to New Orleans at any time?
A. It did.
Q. Do you remember when the line was opened between New Orleans and San Francisco, or about when?
A. I am unable to give the date.
Q. Was it prior to 1885?
A. I am unable to state the date, but I know the road was completed and connected with San Antonio.
Q. Did the Central Pacific Railroad Company operate trains at any time between New Orleans and San Francisco?
A. It did.
Q. Was it doing that at the time that line was taken over by the Southern Pacific Company; that was in 1885?
A. Yes, sir, 1885; early in 1885.
Q. How long before that had it been operating that through road between New Orleans and San Francisco?
A. About two years, I think; it was about two years it was open.
Q. So it was probably about 1883 or 1882?
A. Yes, sir, about 1883.
Q. That the New Orleans line was opened?
A. Yes, sir."

He again testified (II R. 482):

"Q. Was it not a fact that as fast as the road was built and owned for operation south of Goshen to Los Angeles, El Paso, San Antonio and on to New Orleans, as soon as that through line was opened for operation that the Central Pacific Company operated it?
A. It was.

Q. It was the first company that operated that line?
A. The first company.
Q. And your jurisdiction then extended all the way to New Orleans?
A. All the way to New Orleans."

William Henry Norton, Assistant Superintendent of the Southern Pacific Company's electric lines in Oakland, began in the employ of the Central Pacific Railroad Company in 1876 as a telegraph operator in Oakland. From 1879 to 1901 he was a train despatcher in Oakland.

The witness testified (II R. 551):

"Q. After it reached Goshen, and as sections of the road south of Goshen were opened for operation, what company took possession?
A. The Central Pacific.
Q. The Central Pacific Railroad Company?
A. Yes."

W. W. Slater began employment with the Central Pacific Railroad Company in 1869 as receiver of material for the building of the line to Sacramento. He was moved to various places on the Central Pacific line up to 1871, and in 1875 was employed as train despatcher in Oakland. Since 1885 he has been master of the signal system there.

The witness testified (II R. 527):

"Q. Do you know what company operated the road prior to 1885, prior to the advent of the Southern Pacific Company—what company operated those lines you have mentioned?
A. The officers were under the Central Pacific Railroad.
Q. The Central Pacific Railroad Company?
A. Yes.
Q. It operated the line to Mojave, as well as the line to Sacramento?
A. Well, it was under one set of officials, under one division superintendent, the men that I reported to.
Q. Do you know what company operated the line south of Mojave to Los Angeles?
A. It was under the same company, under the same general management.
Q. Were you ever over the line to Los Angeles?

A. Yes, sir.

Q. Did you ever go over the line south of Los Angeles to El Paso?

A. After 1885 I did.

Q. Did you know, prior to 1885, how far the jurisdiction of the Central Pacific Railroad Company extended down south?

A. Under the general management of one set of officers, who were located at Fourth and Townsend Streets—I don't know whether they were Central Pacific or Southern Pacific at that time.

Q. So far as you know, there was only one set of officials?

A. One set of officials.

Q. They were the officials of what company?

A. Of the Central Pacific prior to 1885, and of the Southern Pacific Company after that time."

In addition to the foregoing excerpts, evidence of a similar nature may be found in the testimony of the witnesses Martin (II R. 420), Englebright (II R. 467), Luckett (II R. 541), Railton (II R. 571), Sheedy (II R. 597), Klink (II R. 599), Lister (II R. 531) and Richardson (II R. 635).

The following exhibits (circulars issued from the office of the Central Pacific Railroad Company, announcing the opening of different sections of the Sunset-Gulf line) are evidence of the Central Pacific Railroad Company's operation of that line prior to 1885:

Defendants' Exhibit No. 12 (V R. 1679).
" " No. 13 (V R. 1680).
" " No. 15 (V R. 1681).
" " No. 16 (V R. 1682).
" " No. 19 (V R. 1683).

(7) THE LEASING OF THE SOUTHERN PACIFIC LINES TO THE CENTRAL PACIFIC RAILROAD COMPANY.

It has already appeared that the Central Pacific Railroad Company operated the lines of the Southern Pacific from the

time that they were constructed and ready for operation. The leases under which these Southern Pacific lines were held and operated by the Central Pacific Railroad Company have not been introduced in evidence because they were destroyed in the San Francisco fire of 1906. There is ample evidence in the record, however, of the existence of the Central Pacific Railroad Company's leases. The first line of evidence has already been detailed in showing the operation and possession of the Southern Pacific lines by the Central Pacific, and we shall now refer to the testimony in which specific mention is made of the Central Pacific Railroad Company's leased lines.

We have already spoken of the line from San Francisco south to Gilroy. It will be recalled that, in its early history, it was simply a local line tapping valleys south of San Francisco, and separated from the Southern Pacific construction south by the intervening coast range. This line was called the Northern Division (shown on Map VIII in the Appendix) of the Southern Pacific Railroad Company's lines, and it was not embraced within the system operated under the name of "Central Pacific and Leased Lines." (See testimony of Hood, II R. 456; Redington, II R. 564; Railton, II R. 569; Klink, II R. 600; Richardson, II R. 635; and Hopkins, II R. 650.) According to the testimony of William Hood, the officers of the Northern Division of the Southern Pacific reported directly to the executive officers of the company and not to A. N. Towne, General Superintendent of the Central Pacific and its leased lines. In its last analysis, therefore, the Northern Division of the Southern Pacific reported directly to Stanford, Huntington, Hopkins and Crocker. Whether the operation was *de jure* by the Central Pacific or the Southern Pacific is not made clearly to appear, and is of no consequence.

With the exception of the Northern Division of the Southern Pacific, all the Southern Pacific lines were controlled by the Central Pacific Railroad Company from the time of their construction up to 1885.

H. B. Breckenfeld, a member of the Efficiency Committee of the Southern Pacific Company, was in the service of the Central Pacific Railroad Company in 1870 in the capacity of tele-

graph operator. From 1875 to 1906, his duties included the compilation of the working time tables for the Sacramento Division.

The witness testified (II R. 459):

> "Q. . . . Who were operating the lines before the Southern Pacific Company took possession; what company?
>
> A. The Central Pacific Railroad.
>
> Q. It was operating its own lines?
>
> A. It was operating its own lines, and also the lines which it had leased.
>
> Q. Did that include the lines of the Southern Pacific Railroad Company?
>
> A. Yes."

C. H. REDINGTON was Assistant Treasurer at the general offices of the Southern Pacific Company in San Francisco at the time of the fire in 1906 and, in that position, was familiar with the Treasurer's records.

The witness testified (II R. 564):

> "Q. The lines of the Southern Pacific of California, or of Arizona or of New Mexico, so far as they were operated by the Central Pacific Railroad Company, up to April 1, 1885, were operated by that company as a lessee?
>
> A. Yes, sir.
>
> Q. And on the stationery that has been put in, the significance of the words 'Central Pacific Railroad and leased lines' was the lines which I have described, which were owned by the Central Pacific Railroad Company and the lines of the Southern Pacific Railroad Company which had been leased to the Central Pacific Railroad Company?
>
> A. Yes, sir."

TIMOTHY HOPKINS testified (II R. 649-650):

> "Q. Your jurisdiction as treasurer of the Central Pacific Railroad Company extended from 1882 to 1885, over what lines of railroad?
>
> A. Over the Central Pacific main lines and its leased lines; all of the property of the Central Pacific Railroad.

Q. Generally, what lines did the Central Pacific Railroad Company lease?

A. Various subsidiary lines; a line from Goshen down the San Joaquin Valley to the south.

Q. How far did the line extend from Goshen south?

A. To Yuma; likewise, the Northern Railway of California, from Oakland to Lathrop, and quite a number of other subsidiary lines. The reports will show.

Q. The Central Pacific Railroad Company, during that time, until the Southern Pacific Company took possession in 1885, was also operating all these lines as lessee?

A. It was the operating company for all the lines.

Q. Was it lessee of the lines south of Yuma, or east of Yuma?

A. Yes.

Q. How far did its jurisdiction extend as lessee?

A. Its jurisdiction extended as lessee through the Southern Pacific Railroad Company of Arizona, the S. P. of New Mexico, running through to El Paso. During the first years of my connection with the company the line was finished through to New Orleans, and I think the Central Pacific operated the line as far south as the Pecos River, and perhaps a little beyond. I do not now recall whether we went through to San Antonio on that operation or not.

Q. As treasurer, did your jurisdiction extend over the lines to New Orleans?

A. As treasurer of the Southern Pacific Company, yes."

He again testified (II R. 685) :

"Q. In the operation of the Southern Pacific Railroad and of the Central Pacific Railroad up to the spring of 1885, the Central Pacific Railroad Company acted as the operating company, did it not?

A. Yes.

Q. It operated the Central Pacific Railroad as its own, and the Southern Pacific Railroad as a lessee?

A. Yes; it was the Central Pacific Railroad and Leased Lines.

Q. And the Central Pacific Railroad Company, in operating those lines, operated them as one railroad would naturally operate any several railroads over which it held a lease or leases?

A. It operated it as one system, if that is what you mean."

HENRY CLAY MARTIN, who had started work in the Central Pacific shops at Sacramento during the construction of the line to Ogden and who continued as engineer and conductor during most of the southern construction work and up to 1890, testified as follows (II R. 425-426):

> "Q. Mr. Towne was general manager of the South ern Pacific Railroad and of the Central Pacific Railroad, was he not?
>
> A. Yes, sir. Well, the passes and letterheads were headed 'Central Pacific Railroad Company and leased lines.' "
>
> . . . . . .
>
> Q. How late did the Central Pacific Railroad continue to operate both those lines?
>
> A. I could not tell you. I could not tell you that; but while I was working on the road, I know that their letterheads and passes that were issued were headed 'Central Pacific Railroad Company and leased lines.' "

R. H. PRATT testified (II R. 523):

> "Q. The Central Pacific operated the part of the line from San Francisco to Goshen as the Central Pacific property, did it not?
>
> A. It did.
>
> . . . . . .
>
> Q. And the line from Goshen to New Orleans as the Southern Pacific Railroad Company's property under lease to the Central Pacific, is that correct, as far as the Southern Pacific's rails extended? Is that correct, Mr. Pratt?
>
> A. That is correct.
>
> Q. From the ultimate extension of the Southern Pacific's rails to the eastern boundary line of New Mexico to tidewater at New Orleans. To put the matter simply—from El Paso to New Orleans, did the Central Pacific Railroad Company operate that property as well?
>
> A. They did."

He also testified (II R. 489-490):

> "Q. That letterhead, as we call it, was the letterhead you officials were using for the Central Pacific Railroad Company, was it?

A. It was.

Q. And the only change was stamping across it in red ink 'Southern Pacific Company'?

A. That is all the change."

. . . . . .

The letterhead which the witness so described, was dated San Francisco, April 6, 1885. The printed form of the heading was as follows:

"CENTRAL PACIFIC RAILROAD CO.

and

LEASED LINES

Office General Passenger and Ticket Agent.

T. H. GOODMAN, Gen. Pass. & Tkt. Agent.

R. A. DONALDSON, Asst. Gen. Pass. & Tkt. Agent."

There were, of course, stamped over the words "Central Pacific Railroad Company" the words "Southern Pacific Company."

JULIUS KRUTTSCHNITT, Chairman of the Executive Committee of the Board of Directors of the Southern Pacific Company, entered the railroad service in 1878 as engineer on construction of the Morgan, Louisiana and Texas Railroad and Steamship Company. In 1883 he became superintendent of that road, and in 1885 he was assistant general manager of the Atlantic System of the Southern Pacific Company. In 1895 he was made general manager of the entire Southern Pacific Company, and in 1913 he assumed his present office (II R. 705).

The witness testified (II R. 709):

"Q. Do you remember seeing, during this period (1883-1885), any bulletins posted at La Fayette?

A. Yes; the bulletins of the west end were always posted on the bulletin boards at La Fayette.

Q. How were they headed?

A. They were headed generally 'Central Pacific Railroad Company and Leased Lines'."

The following exhibits (circulars issued from the office of the Central Pacific Railroad Company prior to 1885) are headed "Central Pacific Railroad Company and Leased Lines":

Defendants' Exhibit No. 9 (V R. 1678).
" " No. 10 (V R. 1679).
" " No. 15 (V R. 1681).
" " No. 16 (V R. 1682).
" " No. 18 (V R. 1682).
" " No. 19 (V R. 1683).

Defendants' Exhibit No. 14 (V R. 1681) contains a reference to the Central Pacific Railroad Company and Leased Lines.

(8) IDENTITY OF MANAGEMENT AND EQUIPMENT IN THE OPERATION AND CONSTRUCTION OF CENTRAL PACIFIC AND SOUTHERN PACIFIC LINES.

Frequent mention has been made of the fact that the Southern Pacific lines were operated by the Central Pacific Railroad Company as soon as they were constructed. In addition to this evidence of unified management, the record contains abundant testimony to the effect that the Southern Pacific and Central Pacific lines were built by the same people and managed by the same interests.

James Harvey Strobridge, eighty-eight years of age, who started work for the Central Pacific Railroad Company in 1864 and was superintendent of construction for that company during the time when most of the Central Pacific and Southern Pacific lines were built (II R. 398), testified as follows (II R. 408-409):

> "Q. . . . Was there any difference in the people you were working for in one line, as contradistinguished from the other?
>
> . . . . . .
>
> A. No, sir; I took my orders from Charles Crocker, Leland Stanford, Mark Hopkins and C. P. Huntington,

and no one else. Their order, from any of them, was always good to me.

Q. Was it the same on the Southern Pacific Railroad Company as it was on the Central Pacific Railroad Company? That is the question I would ask.

A. It was the same.

Q. Did you use the same outfit, the same implements on the one line that you did on the other?

A. Yes.

Q. What constituted your outfit?

A. We had horses and carts, teams and wagons, plows and scrapers.

Q. In doing all this work, didn't you move substantially the same outfit around on the different sections of line that you have described?

A. Always.

Q. In other words, you did not have one outfit for the Southern Pacific and another outfit for the Central Pacific?

A. No, sir. Lots of the tools and horses that we used on the Central went on to the Southern.

Q. And back again when you did work for the Central at last?

A. They came right back, moved back."

HENRY CLAY MARTIN, a locomotive engineer in the early period of the Central Pacific Railroad Company's history, testified (II R. 421-422):

Q. Do you remember from whom you ordered your supplies in doing this work?

A. The supplies for the rolling stock?

Q. Anything you wanted.

A. All of our supplies came from the Central Pacific Railroad Company.

Q. Do you remember whether they had any purchasing or supply agent that you corresponded with, or store house from which you got any supplies?

A. Well, Ben Crocker supplied the camp at the time with supplies, teams and the like of that. A. J. Stevens and Ben Welch supplied any parts for repairing locomotives.

Q. That was Stevens?

A. Yes.

Q. Who was Stevens?

A. He was general master mechanic of the Central Pacific Railroad Company.

Q. Where was he located?

A. Sacramento.

Q. Sometimes you had to have your locomotives repaired, did you not?

A. Yes.

Q. Where were they sent for repairs?

A. To Sacramento.

Q. At the Central Pacific Railroad Company's shops?

A. Yes.

Q. And your cars and other equipment used, were they repaired in the same way?

A. Yes.

. . . . . .

Q. Then did you have anything to do with building any part of the Southern Pacific Railroad Company's line from near Soledad?

A. Yes.

Q. What part of it?

A. From Soledad to San Margarita.

Q. What year was that, if you remember?

A. I think that was in 1886, if I recollect correctly, or 1887.

Q. Who were you working for down there?

A. The same outfit. No change.

Q. The same men?

A. Yes, sir; the same officials.

Q. The same men you were working for in Arizona, New Mexico and Texas?

A. Yes.

Q. The same men you were working for from Redding to Ashland?

A. Yes.

Q. And you had the same outfit?

A. Yes.

Q. It was just a continuation of the same outfit of engines, and so forth?

A. Yes; all Central Pacific equipment.

Q. It was all Central Pacific Railroad?

A. Yes.

Q. Who was your paymaster during all of this work?

A. The same paymaster. Part of the time he was Mr. Hanford, and sometimes it was C. H. Redington.

Q. What company were they acting for?

A. We did not know any other but the Central Pacific Railroad Company."

WILLIAM HOOD, in describing the construction done in Texas under the name of the Galveston, Harrisburg and San Antonio Railroad Company, said (II R. 435-436) that the work was

"under my supervision, however, to the extent that, under the direct orders of Mr. Charles Crocker, I would go down there occasionally and revise their line and direct line changes, and approve or veto proposed contracts.

This completed what is known as the Sunset Route as far as San Antonio, Texas. East of San Antonio, Texas, I have no knowledge of it whatever.

Q. You spoke of Mr. Crocker having to do with the construction of that line to San Antonio?

A. Yes.

Q. What did he have to do with it?

A. Well, you understand I mean between San Antonio and a point midway between Langtry and the Pecos River crossing.

Q. You have spoken of him as having to do with this line—I mean the line all the way from Goshen to San Antonio.

A. He had to do with it in this way—just to illustrate: I received a telegram from him by messenger from the military telegraph station to go quickly to the vicinity of the mouth of Devil's River, at the Rio Grande River, and see what was doing, whether the contract should be let, whether the route was right, and in general, to tell them what to do; and I went and did it, of course.

Q. He gave instructions as to that also, just as he had done on the Central Pacific?

A. Exactly the same.

The Witness: That is, my relations with Mr. Charles Crocker were, on the entire construction that I had to do with between Lathrop, California, and San Antonio, Texas, of the same character as my relations with Mr. Charles Crocker on the construction of the Central Pacific Railroad and its branches."

He also testified (II R. 436-437):

"Q. What arrangements were used to pay these forces while you were doing the work, from time to time?

A. In general, they were paid from the same pay car that paid the operating force, train men, shop men and section men.

Q. The pay car of what company was that?

A. The Central Pacific Railroad.

Q. The pay car that came down over the part of the line that was being operated by the Central Pacific Railroad Company would continue on to the front and pay the construction forces?

A. Yes, sir.

Q. Who, if you remember, were in charge of that pay car?

A. Major Hanford was in charge a great deal of the time. . . .

. . . . .

Q. What position did Major Hanford hold?

A. He was known to us as paymaster.

Q. Of what company?

A. Of the Central Pacific Railroad Company."

Again (II R. 438):

"Q. But the final authority in these matters was held by what men?

The Witness: I would take orders, during their lifetimes, without question, on any matter, from either Mr. Mark Hopkins, Mr. Charles Crocker, Mr. Leland Stanford, Mr. C. P. Huntington, and after Mr. Charles Crocker's death, from Charles F. Crocker."

H. ENGLEBRIGHT has been employed by the Central Pacific Railroad Company since 1871, as blacksmith, round-house foreman and master car repairer. He testified (II R. 466-467):

"Q. Do you know about the use of engines and equipment of these different companies, the Central Pacific, the Southern Pacific of California, the Southern Pacific of Arizona, the Southern Pacific of New Mexico, and the G. H. & S. A.? Were those engines, those locomotives, used indiscriminately over the different lines?

A. Yes, they were used indiscriminately over the

different lines, with reference to the classes of the different types that were needed.

Q. State whether or not you have seen engines and rolling stock labeled 'S. P. of New Mexico,' for example, or 'S. P. of Arizona,' in use on the California lines?

A. Yes.

Q. Also Central Pacific rolling stock in use on the lines of the Southern Pacific Railroad in California?

A. Yes, we had them C. P., S. P., S. P. Cal., Northern Railway, S. P. of Arizona, New Mexico, and so forth. They were used indiscriminately on the western division at that time.

Q. Do you remember the two large locomotives, supposed to be large at that time, No. 229 Central Pacific and No. 237 Central Pacific?

A. Yes.

Q. What do you know about them?

A. I know that they were being built at the Sacramento shops, and I made a number of visits up there to look at them while they were under construction; and they were taken south and used on the Southern Pacific, on the Tehachapi hill."

Again (II R. 468):

"Q. What do you know about the company that was operating the Southern Pacific Railroad line south of Goshen to Los Angeles prior to the time the Southern Pacific Company took it in 1885 or 1886, as you have stated?

A. It was all operated under one head, the same managers.

Q. What head was that?

A. The Central Pacific Railroad."

R. H. Pratt testified (II R. 510):

"Q. You did not understand that those gentlemen (Huntington, Hopkins, Stanford, and Crocker) were owners in any sense except as they were stockholders in the corporation?

A. I did. I understand that they were owners.

. . . . . .

Q. Owners of what?

A. Owners of the road they were building."

Again (II R. 524):

> "Q. Speaking now from your intimate and direct connection with the properties as assistant general superintendent, is it not the fact that the Central Pacific Railroad Company and the Southern Pacific Railroad Company at all times within your related experience when the two properties were in concurrent existence, is it not the fact that at all times they were operated as a unified property?
>
> The Witness: It is a fact."

Edgar Melville Luckett started work for the Central Pacific Railroad Company in 1873 in the Sacramento shops, where he was employed as a journeyman up to 1875 (II R. 532). He built engine No. 237 which was used on the Tehachapi mountain (II R. 533). He was made general foreman of the Sacramento shops and held that position up to 1893.

The witness testified (II R. 533-535):

> "Q. During the time you were in the Sacramento shops, for what roads did you do work, building locomotives, and the like?
>
> A. We did work for all the roads, that is, several of the S. P.'s and the C. P.'s, and did some work for the Oregon road, and we did a lot of work for the S. P. of Cal., S. P. of A.—S. P. of Arizona—the G. H. & S. A.—all the roads.
>
> Q. When you say 'C. P.' you mean Central Pacific?
>
> A. Yes.
>
> Q. And 'S. P.' is Southern Pacific?
>
> A. Yes.
>
> Q. And G. H. & S. A. means Galveston, Harrisburg & San Antonio?
>
> A. Yes.
>
> Q. Where is the road of that company located?
>
> A. Down in Texas.
>
> Q. Do you remember the Southern Pacific Railroad of New Mexico, having anything to do with that?
>
> A. Yes, we built locomotives for them. They were commonly called S. P. of N. M.
>
> Q. Did you have anything to do with the building of pumping stations along those lines?
>
> A. Yes, down on the desert of Arizona we built several new pumping stations. They had to haul water

there for years, and we built several quite extensive pumping stations there.

Q. Did you have anything to do with furnishing track supplies and materials to those lines?

A. Yes, we furnished, I guess, all the spikes and bolts and fish plates that were used on the Southern Pacific, that is, most all of them; we could furnish them cheaper than we could buy them at that time.

Q. Do you remember at any time running overtime or extra time in doing this work?

A. Yes; there was a portion of the time, in doing a portion of the work on the Southern Pacific, that we had to work night and day to keep up with our orders for bolts, spikes and nuts.

Q. What road?

A. Down in Arizona, the S. P. of A., when they were building that.

Q. Did you have anything to do with, or ever set up any locomotives for the G. H. & S. A.?

A. Yes, all of the engines that came out for those different roads came to Sacramento, towed out in a train and put together there and set up and shipped to the different places, or consigned to wherever they needed them the worst.

. . . . . .

Q. That was the only general shop?

A. That was the only general shop that the company had.

Q. And that supplied all these roads you have mentioned?

A. Yes, with material of all kinds, and locomotives.

Q. The general repairs were made to those locomotives at what point, at Sacramento?

A. All divisions shipped their engines in there for general repairs; that is, what we called heavy general repairs. There was nothing but small division shops on the different divisions, both south and east.

Q. What sort of repairs did you make at those division shops?

A. Light repairs, running repairs; but never did any heavy work.

Q. Did you know anything about furnishing enginemen and journeymen mechanics, and employees of that sort to the different divisions of those roads, both the Central Pacific and the Southern Pacific Railroad Company?

A. Yes, sir.

Q. What about that?

A. Well, if we had a surplus of men on any division on the C. P., and the S. P. had a rush of business and they wanted more men, we would send them down there, transfer them, and when they got through we would bring them back; and the same way with mechanics, if we had a surplus of mechanics; these different divisions when they wanted mechanics or engineers, always called on Sacramento, called on the general master mechanic; that is, if they could not pick them up themselves.

Q. From what you say, these shops at Sacramento seemed to be practically as much a shop for the Southern Pacific Railroad Company as for the Central Pacific Railroad Company?

A. Yes.

Q. Was there any distinction made with respect to the ownership of those lines?

A. No, sir.

Q. Do you remember when the Southern Pacific Railroad line south of Goshen, towards New Orleans, was being constructed?

A. Yes, sir.

Q. Do you know what was done with that line when sections of it were completed for operation?

A. Well, as soon as the construction department got through with a piece of track, they turned it over to the operating department.

Q. Of what company?

A. The Central Pacific.

Q. The Central Pacific Railroad Company?

A. Yes, turned it over to the same officers; Mr. Towne, for instance, he was general manager; and Mr. Fillmore.

Q. Did that continue right on through, as far as the line was constructed, if you know?

A. Yes."

Again (II R. 539):

"Q. After 1885 what company operated the Pacific system?

A. The Central Pacific. Well, I guess it was the S. P. then, but it was the same men.

Q. I wanted to find out what company it was; which one was it?

A. Well, after that the S. P.; our stationery and everything came out more with 'S. P.'

Q. Don't you know, after 1885, which company was operating the lines west of El Paso?

A. I did not know any difference between S. P. and C. P. It was all managed by the same men, and there wasn't any more men or any less men; all that we knew was that we were working for the same men, and getting our pay from the same pay car."

And again (II R. 543):

"Q. As a matter of fact, through all this time you did not particularly know which of these various railroad companies or other companies were employing you, or operating these various railroads, did you?

A. When I first came to work for the company, of course, there was no S. P. to speak of, but it was C. P. Everything was C. P., C. P., and as long as I worked for them, if anybody asked me where I was working, I would say I was working for the C. P., and I might have been working for the S. P. It was all one company, one set of officers, bosses."

C. H. Redington testified (II R. 553-5):

"Q. What was the business, as far as you know, of the Contract & Finance Company, the Western Development Company and the Pacific Improvement Company?

A. Constructing railroads.

Q. In a general way I will ask you to state the roads that you know they constructed, or that were constructed through the instrumentalities of these companies.

A. The Central Pacific Railroad to Goshen; railroads, I think, south of Goshen; and I know they did south of Spadre. Also they built the branch line from Saugus to Santa Barabara. They built the line through Arizona and New Mexico and through Texas to Pecos River. They built the lines to Needles from Mojave.

Q. While you were paymaster did you see that construction work, or any part of it?

A. Yes, sir.

Q. What was the occasion of your being out to the front, as we call it?

A. I was assistant paymaster of the Central Pacific Company, but I also paid off the construction men for these construction companies. I would go to the end of

the track with the pay car, and then take teams and pay the construction men at sometimes thirty or forty miles from the end of the track.

Q. How often did you go out to the front?

A. Sometimes once a month, and sometimes only once in two months.

Q. Did you, at the same time this line was being built from Goshen south, go over the main Central Pacific line in the same way and pay off the men?

A. Yes, sir.

Q. During the construction of the road south of Goshen all the way to El Paso, as I understand it, you were paymaster of the Central Pacific Railroad Company?

A. I surely was, since they built south of Bakersfield.

. . . . . .

I was in the paymaster's office of the Central Pacific. I had the pay rolls, and I would look over the pay rolls and figure up how much money it would take to pay the trip, and from the construction company Mr. Douty would turn over the pay rolls of the construction company to me with a memorandum that it would take about so much to pay the road. I would then obtain the money from the treasurer of the Central Pacific Railroad Company, and the pay car would start from Oakland Wharf and go as far as the end of the line and pay the Central Pacific men. We still had enough money to pay the construction men. For instance, when I got to Bakersfield, a large number of men were working in the Techachapi Mountains, and we would take a six-horse team—we were paying mostly in silver at that time—and we would go as far as we could that day, and camp on what money I had left, and continue paying those men.

At the same time they were working on the tunnel, the San Fernando tunnel. One trip it took a four-horse team from the summit of the Tehachapi, and we went and paid those men on the San Fernando tunnel, and then came back by stage.

. . . . . .

Q. Did you go as far as El Paso?

A. Yes, sir.

Q. Did you go beyond El Paso?

A. Yes, sir; I went as far as Pecos River."

Again (II R. 565):

> "Q. And prior to April 1, 1885, did the Central Pacific Railroad Company occupy the same position as bankers for all the companies?
>
> A. So I understood, yes.
>
> Q. As the payments were made, they were made more or less after a clearing house method, and charged to the various companies to which the particular payments were chargeable
>
> A. Well, I don't know; I am more familiar with the Pacific Improvement Company. I do not think they had any bank account themselves. At times they borrowed a large amount of money, and would turn it over to the Central Pacific and later the Southern Pacific; that is, if they wanted money, they would draw on the Central Pacific or the Southern Pacific Company, and if they had any amount of money, they would turn it in to the treasurer of the Central Pacific, until after 1885, and then to the Southern Pacific."

EDWARD M. RAILTON was in the employ of the Central Pacific Railroad Company from 1869 to 1885, first as telegraph operator and later as master of transportation. He testified (II R. 573-574):

> "Q. Did you personally know C. P. Huntington, Leland Stanford, Charles Crocker and Mark Hopkins?
>
> A. Yes, I knew each and every one of them.
>
> Q. Did they have anything to do with these roads we have been talking about?
>
> A. Yes; we recognized them as being the practical owners.
>
> . . . . . .
>
> Q. What did they have to do, these gentlemen or either of them, with these roads, the Central Pacific Railroad Company and the Southern Pacific Railroad, that you know of your own knowledge?
>
> A. Well, I know that their instructions, as regards operations of any kind, were followed.
>
> Q. What did Charles Crocker have to do, especially, if anything?
>
> A. Mr. Charles Crocker, more particularly than any of the others, took charge of construction and operation."

Again (II R. 575-576):

"Q. What was the practice of routing trains? Did you consider the ownership of the lines, or did you take the most practicable and best route for trains, without reference to ownership?

The Witness: There was no regard paid to the ownership of the various companies. We routed trains by whichever was the best and most direct route.

Q. Can you give instances where that was done?

A. Yes; trains were diverted, directed to go, if you please, via Port Costa and Benicia to Sacramento, or via Antioch and Tracy, or, if you please, by way of Livermore and Tracy. Train service was maintained without any regard to the actual mileage made, in order to meet the exigencies of the occasion."

And again (II R. 576-577):

"Q. Do you know where the general repairs were made to cars and locomotives on all these lines under your jurisdiction from 1880 to 1885?

A. Sacramento principally, construction and general repairs, overhauls; also at Oakland.

Q. That is, the Sacramento shops of the Central Pacific Railroad Company?

A. Yes.

Q. The Southern Pacific Railroad Company had no shops there?

A. No, sir.

Q. And those shops made repairs for the Southern Pacific Railroad line all the way to El Paso, just as it did for the Central Pacific line to Ogden?

A. Those were our general repair shops, for both cars and locomotives.

Q. Now, as to the equipment purchased for use on those lines, were they allotted to the ownership of different companies?

A. As far as the marking of the cars was concerned, some were marked 'Southern Pacific' and some of them marked 'Central Pacific.'

Q. Did you ever see any G. H. & S. A.?

A. Freight cars, yes; and occasionally passenger cars. So far as freight cars were concerned, there were innumerable markings.

Q. Did you ever mark any cars 'S. P. of A.'?

A. S. P. of A., and S. P. of N. M.

Q. Were those cars and locomotives marked in this way used on the particular line for which they were marked, or were they used indiscriminately?

A. Indiscriminately; locomotives marked 'S. P. of New Mexico' would haul trains between Sacramento and Oakland, and engines marked 'Central Pacific' would be hauling trains out of Los Angeles, in both passenger and freight service.

Q. So the equipment was used wherever it was suitable?

A. Indiscriminately.

Q. Without reference to its marking?

A. Without any reference to it whatever.

Q. And all these lines were operated as one system?

The Witness: Yes."

JOHN E. FOULDS, who entered the service of the Central Pacific Railroad Company in August, 1871, and after January, 1876, acted as attorney for that company and its allied and subordinate corporations (II R. 578-579), testified (II R. 581-582):

"Q. Before that time, what company operated all of these lines; all of the companies mentioned, except the northern division?

A. The Central Pacific Railroad Company.

Q. And what you have said concerning the control or authority exercised by the four gentlemen you have mentioned, or their successors, refers to the Southern Pacific Company as well as the Central Pacific Railroad Company?

The Witness: Yes.

Q. And does it also refer to the construction companies, the Contract & Finance Company, the Western Development Company and the Pacific Improvement Company?

A. All of those companies.

Q. And the Southern Pacific Railroad Company?

The Witness: Yes.

Q. Under whose instructions were you acting when you organized the Pacific Improvement Company?

A. I think under the instructions of Governor Stanford.

Q. Did you attend to business arising on all these lines and any of them, the Southern Pacific Railroad, the

Central Pacific, or any of these corporations in California, or the Pacific Improvement Company?

A. Oh, yes; we treated them as all belonging to our regular law department business.

Q. The law department covered all of the lines?

A. All of those lines.

Q. And you were just as much attorney for the Southern Pacific in Arizona as you were for the Central Pacific Railroad in Nevada?

A. Practically."

Again (II R. 587-588):

"Q. I will ask you whether the actions of those men had any reference to whether they were an officer or director of any particular corporation.

The Witness: I can not say that they had; but it was always assumed that they had the necessary authority to order the operations directed by them.

Q. For instance, I remember that neither one of those gentlemen was an officer at all of the Pacific Improvement Company, and yet, within your knowledge, did not those gentlemen control and direct that corporation, just as much as any other of those corporations mentioned?

The Witness: Yes."

And again (II R. 589):

"Q. And yet was there any distinction in the supervising control or authority of these men exercised as to the corporations they were directors or officers in, as compared with those in which they were not?

A. They controlled them all in the same way.

Q. During the lifetime of Mr. Huntington, Mr. Crocker and Mr. Stanford, did you notice any lessening of the control or influence they had over the Central Pacific or the Southern Pacific?

The Witness: No, I cannot say that I did."

PATRICK SHEEDY has been in the employ of the Central Pacific and Southern Pacific Companies as machinist, foreman, and Superintendent of Motive Power since 1868. He testified (II R. 593-595):

"Q. Did you or did you not repair engines that were used on that line in Arizona, New Mexico and even in Texas?

A. I do not recall any coming from Texas; but I repaired engines from west of El Paso. We sent engines into Texas.

. . . . . .

Q. Did you or did you not furnish any material that was used in the construction of the Sunset Line, we will call it, from Goshen to El Paso?

A. I had nothing to do with the furnishing of material. I did not furnish any.

Q. Do you remember whether any engine men were detailed from the shops to go to that line?

A. I remember; engine men were detailed to go with the engines and take them down there.

Q. Do you remember the engines labeled '229 C. P.' and '237 C. P.'?

A. I do.

Q. Where were those engines built?

A. They were built in Sacramento.

Q. At the shops in Sacramento?

A. At the Central Pacific shops in Sacramento.

Q. And where were those engines used?

A. They were used on the Tehachapi Mountain.

Q. On the Southern Pacific line?

A. Yes, on the Southern Pacific line.

Q. To what company did those engines belong?

A. They were marked 'Central Pacific'.

Q. Did you notice any engines marked 'S. P. R. R. of Cal.' at any time?

A. I did; yes, sir.

Q. Do you know to what company those engines belonged.

A. I presumed they belonged to the same company that owned all the engines, and were simply marked that way to designate them from others that were assigned to other districts.

Q. Your knowledge consisted merely of the marking of the engines? Did you have occasion to go further, and to know exactly where the ownership of those engines resided, whether in one company or another?

A. No, sir; I never did.

Q. Do you remember any engines marked 'S. P. of A.'?

A. I do.

Q. What did that label mean?

A. Southern Pacific of Arizona.

Q. Do you remember any engines marked 'S. P. of N. M.'?

A. I do.

Q. What did that label import?

A. Southern Pacific of New Mexico.

Q. Were those two last mentioned engines used on the California lines in California?

A. They were, when required.

Q. Do you know about the distribution of this rolling stock, as to how it was distributed; whether or not there was any regard paid to the ownership of the lines?

The Witness: I never knew that there was any distinction made in distributing the engines."

GEORGE T. KLINK became a clerk in the accounting department of the Central Pacific Railroad Company in 1883. He was appointed Auditor of disbursements for the Southern Pacific Company in 1895, and held that position until 1904. He testified (II R. 609).

"Q. Was there any interchange of rolling stock between the Central Pacific Railroad Company and the northern division of the Southern Pacific Railroad Company in those days prior to April 1, 1885?

A. I believe that there was, to a limited extent, anyway.

Q. Was that charged and credited on some per diem or mileage basis?

A. No, sir; I think not."

Again (II R. 612):

"Q. The lessee company was practically, in all fiscal matters, the banker for all the different companies?

A. Yes.

. . . . . .

Q. There were material differences in the personnel of the officers and directors of the Central Pacific Railroad Company, the Southern Pacific Railroad Company and the Southern Pacific Company?

A. A great many of them were the same individuals. There were exceptions. For the most part, the directors or the owners of the property, the Central Pacific Railroad Company, were also directors of the Southern Pacific Company."

JAMES HORSBURGH, JR., said (II R. 629) that at that time the jurisdiction of the General Passenger Department of the Southern Pacific Railroad Company extended to New Orleans. He further testified (II R. 630-631):

"Q. Did you know Leland Stanford?
A. Yes.
Q. Did you know C. P. Huntington?
A. Yes.
Q. Charles Crocker?
A. Yes.
Q. Mark Hopkins?
A. Yes.
Q. Did they have anything to do with these lines?
A. We considered them the owners; all instructions came from them.
Q. Did you receive instructions from those men, or any of them?
A. Yes, from each of them."

TIMOTHY HOPKINS testified (II R. 649):

"Q. Your jurisdiction as treasurer of the Central Pacific Railroad Company extended from 1882 to 1885, over what lines of railroad?
A. Over the Central Pacific main lines and its leased lines; all of the property of the Central Pacific Railroad."

He further testified (II R. 651):

"Q. Did you, as treasurer of the Central Pacific, have anything to do with the Pacific Improvement Company?
A. Yes.

. . . . . .

Q. Did you have anything to do with obtaining moneys for the Pacific Improvement Company to pay its expenditures?
A. Yes. Do you want the process, Mr. Herrin?
Q. Yes.
A. The Pacific Improvement Company was the constructing company and had large expenditures to make. Money was deposited with me as treasurer of the Central Pacific Railroad Company up to 1885, and as treasurer of the Southern Pacific Company thereafter. They drew drafts against these amounts deposited with me,

and they generally had a large balance on hand, running into heavy amounts. Occasionally they might run short, but the drafts were paid just the same; and in these rare instances when the money would not be on hand to meet the drafts, I personally would go out and borrow the money of somebody in San Francisco to make good.

Q. You would borrow the money for what company?

A. For the Pacific Improvement Company. I had no official connection with that company, nor was I an officer of it, but it was a part of my duty to keep alive the notes that were outstanding."

Again (II R. 654):

"Q. Was there, at any time, in any of these meetings, any adverse vote or vote in opposition to the wishes of the Huntington, Stanford and Crocker interests?

The Witness: During the time that I was a director there was never a meeting of the stockholders or directors in which there were adverse interests. Everything was unanimous and directed by the four parties in interest."

Again (II R. 669):

"Q. Did the fact that Messrs. Stanford, Huntington, Crocker and yourself were not directors in any of these subordinate companies, affect in any way your control or management of the property owned by those companies?

A. Not at all. The companies were managed as a unity. The directions given by the four parties in interest were irrespective as to whether they were directors in that corporation or not. I know that was my action. I never stopped to consider whether I was a director of any company. When there were things to be decided and done, I gave my instructions and they were followed accordingly."

Again (II R. 672):

"Q. Was there ever any distinction made between the lines of the Central Pacific Railroad Company and the Southern Pacific Railroad Company on account of their ownership? What I mean by that is, were they operated separately or were they operated together, as if they were in one ownership?

The Witness: They were operated as one company; no distinction made as to which line was which.

Q. Do you know who were the owners of the capital stock of the Southern Pacific Company at the time it began its operations in 1885?

A. Stanford, Huntington, Hopkins and Crocker owned most, if not all, of the stock. I, for the moment, do not recollect whether Mr. Pierce, through the Galveston, Harrisburg & San Antonio Company and eastern lines there, received some of that stock or not.

Q. I think these minutes show that he did.

A. That is my impression, that he did, and that it was owned by S. H. H. C. and Pierce, and I think some of the Morgan people took a little of the stock also, but I will not be certain as to that feature of it.

Q. State whether or not at all times that you have mentioned the H. H. S. & C. interests were the owners of a clear majority of the Southern Pacific Company's stock.

A. Yes, undoubtedly, a great majority."

Again (II R. 678):

"Q. So far as the exact ownership of the stock of the Central Pacific Railroad Company at that particular date (1884) is concerned, you really know nothing except the fact that it is in Mr. Brown's handwriting?

A. Yes. I do know this, that the control of the Central Pacific was in the hands of the 'big four' interests, Stanford, Huntington, Hopkins, and Crocker. The exact number of shares that each held in their own name, or in the names of others, I cannot recall; but that there was a control of the company by those four interests, there was never any question as to that.

Q. You mean a voting control?

A. A voting control, absolute control, and a managing control."

And again (II R. 689):

"Q. Is not that about the situation?

A. The control of the Central Pacific was likewise in the hands of the four interests at the time. The Central Pacific had been the leasing company, and in the changing of those relations, which were of course satisfactory to the stockholders at the time—or it would

not have been done—I think that it was considered to be a proper thing to put that company beyond any peradventure of criticism upon a change that might have appeared sudden to some of the outside stockholders. To that extent your question is pertinent and right.

Q. That is, the southern lines, using that to describe the line through El Paso which I have mentioned, was not only controlled as a corporate voting matter, but was very nearly entirely owned by these same interests that were coming into the Southern Pacific Company?

A. Yes.

Q. So that they were, so to speak, the whole thing on both sides of the trade, so far as the lease was concerned?

A. All of those companies were controlled by the same parties, including the Central Pacific."

JULIUS KRUTTSCHNITT testified (II R. 707):

"Q. How did Mr. Huntington act with reference to the road; as an outsider or as one interested in it?

A. Of course I never came in direct contact with him, except on this one occasion, but I was in continual conference with Mr. Hutchinson, and I knew by instructions that he gave me and letters that he showed me that he was receiving instructions from Mr. Huntington.

Q. The letters he showed you were from Mr. Huntington?

A. Yes.

Q. And Mr. Huntington was not at that time an officer of the Morgan Company?

A. No.

Q. Did Mr. Hutchinson obey the instructions of Mr. Huntington?

A. Yes, he did.

Q. That was in 1883 and 1884?

A. And 1884."

He further testified (II R. 710-711):

"Q. Was there anything in those early times in the construction of the G. H. & S. A. which you observed, the materials used or otherwise, to show a connection with the Central Pacific Railroad Company? If so, what were those evidences of connection with the Central Pacific?

A. Well, they were very numerous and apparent at once to a railroad man. For instance, the G. H. & S. A. had on its lines, operating them, a number of Central Pacific locomotives. It had a number of its own, of exactly the same design; and the most striking feature of the design was a very exaggerated and clumsy looking smokestack, which was known as a Stevens smokestack, designed by Mr. Stevens, the general master mechanic of the Central Pacific, and which was used on the Central Pacific locomotives and the G. H. & S. A. locomotives. Then, as to box cars, there was a box car, a Central Pacific box car, of Mr. Towne's own design, of which he was very proud, which he said was an equally good stock car and box car. He ought to have put it an equally bad stock car and box car, because it was neither. It had about twelve openings in it to protect against thieves and dust and rain; and all of the new G. H. & S. A. box car equipment—which at that time were quite new—was built on that plan. The trucks were identical in design with the Central Pacific trucks. The method of hanging the brakes, the draw heads, the wheels—a great many wheels were actually made in Sacramento—and, again, in the style of architecture of the buildings, the buildings put up on the west end of the G. H. & S. A. were identical in design with buildings on the Southern and Central Pacific lines; the depots were the same design.

Q. How about the rails?

A. A great many of the rails were rolled by the same makers. There was one maker in particular that I heard Mr. Huntington speak of, Cammel of Sheffield, who, he said, had made him the best rails for the Central Pacific he had ever gotten, and that he had ordered rails from him for the G. H. & S. A. They were the same weight, the same cross section and the same length as the Central Pacific rails. The switches and frogs were actually Central Pacific, because they were made in Sacramento and were shipped down to the line of the G. H. & S. A.

Q. How about the train rules?

A. The train rules for the lines west of La Fayette were the Central Pacific rules. In all of my correspondence with the officers of the lines west of La Fayette I never remember their using any letterheads except 'Central Pacific and Leased Lines.'"

H. B. Breckenfeld testified (II R. 458):

"Q. In arranging these time tables and routing trains, was any attention paid to the ownership of these particular lines, or were they regarded as one property?

The Witness: The time tables were compiled with the idea of performing the best service; there was no attention paid to the corporate boundaries."

Archie Lister, a train dispatcher in Oakland from 1872 to 1900, testified as follows (II R. 531):

"Q. You handled the trains during certain hours as far as Mojave?

A. Yes, sir.

Q. And the Needles as well?

A. Yes; when they opened that line.

Q. And you were working for what company when you did that?

A. The Central Pacific, western division. That was called the Western Pacific when I started in, when I first started in.

Q. You were working on what was called the Western Pacific then?

A. Yes.

Q. How long did you continue to work for the Central Pacific Railroad Company?

A. Well, until they retired me, as far as I know 1910.

Q. You never heard of the Southern Pacific Company?

A. Only just about 1885, or somewhere in that neighborhood, the cars and locomotives and so on were initialed S. P., and some C. P.

Q. Did you ever work for the Southern Pacific Company?

A. Well, it was all the one thing to me. I did not know the difference, in fact."

Reference may also be made to the testimony of the witnesses Johnson (II R. 548), Richardson (II R. 637) and Jackson (II R. 642).

(9) STEPS TAKEN BETWEEN MARCH 17, 1884, AND APRIL 1, 1885, FOR THE ORGANIZATION OF THE SOUTHERN PACIFIC COMPANY, FOR THE TERMINATION OF THE LEASES TO THE CENTRAL PACIFIC RAILROAD COMPANY, AND FOR THE LEASING OF THE CENTRAL PACIFIC AND SOUTHERN PACIFIC LINES TO THE SOUTHERN PACIFIC COMPANY.

March 17, 1884, an act to incorporate the Southern Pacific Company became a law of Kentucky (Acts Ky. 1883-4, Vol. I, p. 725).

The history of the organization of the Southern Pacific Company in 1885 under this law is detailed in the testimony of Timothy Hopkins, who was summoned from San Francisco in the summer of 1884 to attend a meeting in New York with Messrs. Huntington, Stanford and Crocker. The minutes of this meeting, written by W. E. Brown, who was appointed secretary, have been introduced as Defendants' Exhibit No. 21 (V R. 1688). The organization plan and the conferences of Stanford, Huntington, Hopkins and Crocker, at their meetings in New York in the autumn of 1884, may be found in these minutes and in the testimony of Mr. Hopkins.

Mr. Hopkins testified (II R. 655):

> "Q. Please state how you came to attend those meetings?
>
> A. I received a telegram from Senator Stanford, then in New York, asking me to go on, in the summer of 1884. I think it was in the latter part of July when I proceeded to New York. I found there Senator Stanford, Mr. Huntington and Mr. Crocker, and it was explained to me that the meeting was desired in order to go over our affairs generally, and likewise to take up the question of the organization of a new company for the purpose of holding and operating the railroad companies that were owned by the interests and controlled by them, both those under the management of the Central Pacific and those east of El Paso in Texas and Louisiana."

The first business of the meeting was to formulate a basis of settlement with Thomas W. Pierce of Boston (II R. 657), who was largely interested in the Galveston, Harrisburg and

San Antonio Railroad, and the Louisiana Western Railroad, as a stockholder. He was likewise a stockholder in the Southern Development Company, which had constructed the line in Texas between El Paso and San Antonio. Mr. Pierce held one-fifth of its capital stock, the other four-fifths being held by Huntington, Stanford, Hopkins and Crocker. As part of the agreement Mr. Pierce was to sell his shares of the capital stock of the Galveston, Harrisburg and San Antonio Railroad Company and of the Texas and New Orleans Railroad Company, and he was to be credited for the same on the books of the Southern Development Company. In addition, Mr. Pierce agreed to put in his 28,059 shares of stock of the Galveston, Harrisburg and San Antonio Railroad Company, receiving 150 shares of the Southern Pacific Company for each 100 shares of the Galveston, Harrisburg and San Antonio stock (II R. 658).

After the adjustment of interests between Mr. Pierce and Mr. Stanford and his associates, the organization of the Southern Pacific Company was planned.

We quote the following from the testimony of Mr. Hopkins (II R. 660-665):

> "Q. . . . I will call attention to the minutes of September 10th, which read:
>
> 'I, E. Gates and W. E. Brown were appointed a committee to examine all securities on hand in New York and all that were used as collaterals for the payment of the liabilities of S. H. H. & C.
>
> 'To ascertain what securities are available, and generally to make such an examination of the properties of S. H. H. & C. in New York, as they would make if examining for an executor of one of the parties, and to make out a schedule of all securities belonging to S. H. H. & C. in New York, so that the several parties in interest can sign the schedule as of date as being correct on that date.'
>
> Do you recall that transaction?
>
> A. I recall that action.
>
> Q. Will you state what it was? What was the purpose of it?
>
> A. Well, this meeting was primarily for the purpose of organizing the Southern Pacific Company. There were a lot of preliminary matters which were first taken

up, and an inventory of securities in New York was one of those preliminary matters, in order to ascertain what our resources were and where they were. The four interests—by that I mean Stanford, Huntington, Hopkins and Crocker—were large borrowers of money, and as the money market was in New York, they always maintained there a large number of securities in order to take care of the collaterals upon these loans. These matters were all in Mr. Huntington's hands, and he operated them, and at this meeting, and while we were all together, it was one of the times when we checked up to see where we stood.

. . . . . .

Q. I call attention to the minutes of September 11th: 'It is agreed that the order of consideration of affairs shall be as follows:

1st. Consolidation of all the lines of Southern Pacific System in one company.

2d. Separation of Central Pacific business from the Southern Pacific business.

3rd. Leasing of Central Pacific System to Southern Pacific System. (New organization.)

4th. General consolidation of lines from San Francisco to Newport News.'

Do you remember that meeting?

A. Yes.

Q. You said a while ago that the main object was to consider that?

A. The organization of a new holding company to take over and operate the through line from New Orleans to California.

Q. What was the reason for doing that? Was not the Central Pacific Railroad Company and leased lines a satisfactory organization, or what reason was there, as you recall it?

A. The Central Pacific leased lines system had become very much smaller than the Southern Pacific Company interests had become; in fact, the Southern Pacific lines, when completed through to New Orleans, were at least twice as long as that of the Central Pacific main lines, and we considered it advisable that as long as the larger interests were concentrated in the Southern Pa-

cific Company, it should be the operating line, and accordingly we discussed and arranged what was considered a fair and equal manner of doing it, and we put it into effect.

. . . . . .

Q. . . . you did decide to locate the general offices of the Southern Pacific Company at San Francisco?

A. Yes, sir.

Q. And that was afterwards done?

A. That was afterwards done.

Q. And you did decide to have S. H. H. & C., those four interests, convey to the Central Pacific and Southern Pacific Companies the property in San Francisco owned by them which was used for terminal facilities?

A. Yes; and that was done.

. . . . . .

Q. I call your attention to the minutes of October 1st, which states:

'Assembled at 11 A. M.

'Leland Stanford was appointed a committee of one to formulate his proposed method of leasing the several roads forming the through line of Southern Pacific Company.

'It was decided to take immediate action towards raising the capital stock of the Southern Pacific Company to 100 millions, and to have temporary certificates of stock printed, to be exchanged hereafter when steel plate certificates can be prepared.'

Did you increase the capital stock of the Southern Pacific Company to one hundred millions?

A. Yes; the Southern Pacific Company had been organized the previous spring in Kentucky. At that meeting it was agreed upon that it should be raised, and it was afterwards so done, and the temporary stock certificates issued.

. . . . . .

Mr. Herrin: (reading) 'It is agreed that the directors of the Southern Pacific Company when permanently organized, shall consist of seven, viz: C. P. Huntington of New York, T. W. Pierce of Boston, and five others to be selected, from San Francisco, and that the general offices be located in San Francisco.'

By Mr. Herrin:

Q. You recall that meeting, do you?

A. Yes; that was done.

. . . . . .

Q. It is unnecessary to go through these minutes in detail, because they speak for themselves, I think. I will ask you, however, as to the minutes of November 5, which read:

'The question of leasing the Central Pacific system of roads to the Southern Pacific Company came up.

'It was agreed to lease the properties and temporarily to fix the lease at Fixed Charges, and a guarantee of 2% interest on capital stock, and all the earnings of the Central Pacific system over and above that percentage, until the amount reached 6% on its capital stock per annum. After 6% all profits to go to the Southern Pacific Company.'

Was that the basis upon which you finally made the lease of the Central Pacific to the Southern Pacific Company?

A. Yes. That was afterwards carried out by proper corporate action."

Pursuant to this arrangement, the Southern Pacific Company was fully organized, and on February 10, 1885, entered into an agreement (D. Ex. 20, V R. 1683), whereby it became the lessee, for a term of ninety-nine years *from the date last named,* of all the railroad properties of the seven companies whose roads make up the Sunset-Gulf route of the Southern Pacific Company.

February 17, 1885, the Central Pacific Railroad Company leased all of its properties to the Southern Pacific Company for a term of ninety-nine years *from April 1, 1885.* (See Exhibit "A" to Petition. I R. 13.)

This lease contains the following clauses:

"And the said Central Pacific Railroad Company hereby assigns to the said Southern Pacific Company all the leases which it now holds of railroads and other property situated in said State of California, and lying and being north of the Town of Goshen, in the County of Tulare, with the right to take, hold, operate, maintain, and enjoy said railroads and other property in the same manner as the said Central Pacific Railroad Com-

pany holds, operates, enjoys, and maintains the same under the said leases, and with the right to receive the rents, issues, and profits thereof.

And the said Central Pacific Railroad Company hereby releases the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the United States and of the State of California, and the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the Territory of Arizona, and the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the Territory of New Mexico, and each of them, from all and every obligation under or by virtue of any and every lease made by said three last-mentioned railroad companies, or either of them, to the said Central Pacific Railroad Company, and transfers and surrenders unto the said Southern Pacific Company the possession of all the property in said leases, or any of them mentioned or described, with the right to receive the rents, issues and profits thereof free from all claims of the said Central Pacific Railroad Company to the same or any part thereof."

By these leases, the Central Pacific-Southern Pacific system passed into the control and ownership of the Southern Pacific Company and was thenceforward the Southern Pacific-Central Pacific system.

At or about the same time in 1885 the Southern Pacific Company acquired the whole or substantially all of the capital stock of the seven companies whose lines made up the Sunset-Gulf Route, namely, the Southern Pacific Railroad Companies of California, Arizona, New Mexico, the two Louisiana railroad corporations, and the two Texas railroad corporations named in the Petition (I R. 3). (Klink, II R. 666-668.)

The manner in which this change of legal ownership of the Central Pacific properties through lease, and the Southern Pacific Railroad properties through lease and stock ownership, was carried into effect, is now to be shown.

(10) THE CHANGE FROM CENTRAL PACIFIC OPERATION TO SOUTHERN PACIFIC OPERATION MARCH 1, 1885, TO APRIL 1, 1885.

On February 27, 1885, a circular notice was issued from the office of the President of the Southern Pacific Company, announcing that the lease had been arranged. This circular [Defendants' (Pratt) Exhibit No. 2, II R. 491-492] is as follows:

"CIRCULAR NOTICE.

SOUTHERN PACIFIC COMPANY,

Office of the president.

San Francisco, Feb. 27th, 1885.

Arrangements having been effected by the various railway companies interested between San Francisco and New Orleans, comprising the following roads, namely: The Southern Pacific, of California, Southern Pacific, of Arizona, Southern Pacific, of New Mexico, Galveston, Harrisburg and San Antonio, Louisiana Western, Texas and New Orleans and Morgan's Louisiana and Texas Railway and Steamship lines, and roads controlled by the said companies, for a unification of their joint administration, and with a view to a more economical working of the properties, it has been decided that on and after March 1st, 1885, these properties will be operated under one general organization, known as the Southern Pacific Company, with headquarters at San Francisco, Cal., divided into two sections; all west of El Paso will be known as the Pacific System and all east thereof as the Atlantic System.

The organization for the administration of the general conduct of the business of the Company will be briefly as follows:

Under the direction of the President the General Managers will attend generally to the business of the Company, having the supervision and direction of all the departments of the service of the Company within their respective jurisdictions, the financial and accounting departments excepted, and their orders will be obeyed and respected accordingly.

The Secretary and Controller will have charge of all books and accounts, and will, subject to confirmation by

the President, nominate and fix the compensation of suitable persons for the heads of the various offices of the accounting department.

The Treasurer will have charge of all revenues of the Company, and will appoint, subject to confirmation by the President, such assistants as may be necessary for the conduct of the business.

The General Traffic Manager, under the direction of the General Manager of the Pacific System, will be charged with the handling of all through business of the Company, and that interchanged by, or which may be competitive between, the Pacific and Atlantic Systems.

OFFICIALS OF THE LINE.

A. N. TOWNE, General Manager Pacific System, San Francisco, Cal.

A. C. HUTCHINSON, General Manager Atlantic System, New Orleans, La.

J. C. STUBBS, General Traffic Manager, San Francisco, Cal.

All other officers and agents will be continued on the various roads and divisions as under the previous organization until further notice by the General Managers.

LELAND STANFORD, President."

A second circular notice [Defendants' (Pratt) Exhibit No. 3], issued from the General Manager's office of the Pacific System of the Southern Pacific Company, dated April 1, 1885, announces the lease of the Central Pacific lines to the Southern Pacific Company. This circular was read into the record at page 493, and is as follows:

"SOUTHERN PACIFIC COMPANY,

Pacific System.

General Manager's Office.

SAN FRANCISCO, April 1, 1885.

TO ALL OFFICERS AND EMPLOYEES:—

Announcing the lease, by the Southern Pacific Company, of the Central Pacific Railroad and lines heretofore under lease to the last-named Company, taking effect this day, it is the purpose of this Circular to advise all officers, agents and employees of the various

roads and lines comprising the system that they will, until further notice, continue in the performance of their various duties as heretofore, sending reports and correspondence regarding the affairs of the Company to the heads of the various offices as formerly.

Respectfully,
A. N. Towne,
General Manager."

There is frequent reference in the record to the change from Central Pacific to Southern Pacific operation in 1885.

H. B. Breckenfeld testified (II R. 462-463):

"Q. On the 28th of February, 1885, we have the only operating organization, the organization of the Central Pacific Railroad Company, do we not?

A. Yes.

Q. There was not any new organization put into the field in that spring, was there?

A. Any new operating organization?

Q. Yes.

A. Why, in the spring of 1885 the Southern Pacific Company was organized, and its functions were announced in this general circular to all the employees.

Q. And it took over the entire operating organization of the Central Pacific Railroad Company?

A. Yes, sir.

Q. And it did it at one time?

A. Well, it did it at one time, except that it was my recollection that there was a slight interval—whether that is of any moment or not—my recollection is that there was a slight interval in the dates of the announcements of the two transactions, something like a month.

Q. You, on the 28th of February, 1885, were doing some work connected with operations over the Central Pacific Railroad, and some work connected with operations over the Southern Pacific Railroad, were you not?

A. Yes, sir. If these branch lines at that time had been taken over by the Southern Pacific—of which I am not sure now. Those ran along, and they were acquired by the Southern Pacific Railroad at various times, with which I am not entirely clear.

Q. Did you enter the employ of the Southern Pacific Company as to some lines, yourself, at a different date

from that at which you entered it as to the lines of the Central Pacific Railroad Company?

A. There was no ceremony. I did not enter the employ of the Southern Pacific Company in that sense. I simply received this information, that the Southern Pacific Company had taken over these various lines, and that all employees would continue the same as they were doing at that time; so that I just kept on working.

Q. Did you receive two different circulars yourself, one as to one lot of lines and one as to another lot of lines?

A. My impression is that there were two circulars; but as to that I am not entirely clear. I think there were two.

Q. When last did you see either one of those circulars?

A. I think it was about a month ago.

Q. Which one did you see then—or did you see both of them?

A. I think I saw the Central Pacific.

Q. Did you see any as to the Southern Pacific Railroad at that time?

A. I think not.

Q. When last did you see the circular as to the Southern Pacific Railroad, having reference to this turnover of the spring of 1885?

A. Why, I think perhaps four or five months ago.

Q. Did you see that at the same time that you saw the one as to the Central Pacific?

A. I am not very sure as to that. I have been looking at a number of circulars, and I am not quite sure just how it is about that.

Q. Where were these circulars when you saw them within the present year?

A. They were in the Flood Building.

Q. Here in the Southern Pacific Company's offices?

A. Yes, sir."

He also testified (II R. 459):

"Q. Do you remember when the Southern Pacific Company took possession of the Central Pacific lines?

A. April 1, 1885. How I remember it is that there was a circular issued by the officials of the Central Pacific indicating that such would be the case.

Q. Do you remember when the Southern Pacific took possession of the Southern Pacific lines?

A. It was about the same time; I think perhaps a little sooner."

Again (II R. 460-461):

"Q. The Central Pacific Railroad Company continued to operate the Central Pacific Railroad up to April 1, 1885?

A. Yes.

Q. Did the Central Pacific Railroad cease to operate the Southern Pacific Railroad before it ceased to operate the Central Pacific?

A. Such is my recollection."

Edgar Melville Luckett testified (II R. 536):

"Q. Do you remember when the Southern Pacific Company, the present company that is operating these lines, took possession of them?

A. Not exactly, I do not. I think it was around 1885 or 1886, somewheres around in there. I remember the time, but I can not recall dates."

William Henry Norton testified (II R. 550):

"Q. Do you remember when the Southern Pacific Company was substituted in place of the Central Pacific Railroad Company as an operating company?

A. Yes; I believe that was April 1, 1885.

Q. You remember that time, do you?

A. Yes."

He further testified (II R. 551):

"Q. Was this change of operation, when the Southern Pacific Company began to operate on April 1, 1885, applied over all the different lines?

A. That is my understanding, yes.

Q. That is, up to April 1, 1885, the Central Pacific Railroad Company had been operating all these various lines that you have described, both the Central Pacific Railroad and the Southern Pacific Railroad, and on that date the operation was changed over to the Southern Pacific Company; is that correct?

A. The best way I can answer that is this: I am only

on one division, and I do not know what is doing on the others; but my understanding was that on that date the line was turned over, in a matter of form only."

C. H. Redington testified (II R. 565):

"Q. And on the stationery that has been put in, the significance of the words 'Central Pacific Railroad and leased lines' was the lines which I have described, which were owned by the Central Pacific Railroad Company and the lines of the Southern Pacific Railroad Company which had been leased to the Central Pacific Railroad Company?

A. Yes, sir.

Q. Then, as of date of April 1, 1885, all those leases were cancelled and the Southern Pacific Company took up the operation of the various lines, as a lessee company?

A. Yes, sir; I am not familiar with the leases, but that was the operation."

Edward M. Railton testified (II R. 575):

"Q. I would like to ask about the creation of what they call the Atlantic system and the Pacific system. Would you know about that?

A. Well, at the time of the formation of the Southern Pacific Company, when the Southern Pacific Company took possession, the line was divided at El Paso. The Rio Grande River, as a matter of fact, was always regarded as El Paso, and the operating officials from the New Orleans end took charge of that, while the officials from San Francisco retained charge as far as the Rio Grande River.

Q. But the Southern Pacific Company extended itself over the whole line from New Orleans to San Francisco?

A. Yes."

He further testified (II R. 577):

"Q. The Southern Pacific Company took possession in 1885. Can you tell me whether the date was April 1st?

A. It was during April. Whether it was the 1st of April or not, I do not know."

PATRICK SHEEDY testified (II R. 593):

> "Q. Do you remember when the Southern Pacific Company, the company at present operating these lines, took possession and succeeded the Central Pacific Railroad Company?
> A. I do.
> Q. What year was that?
> A. In 1885."

GEORGE T. KLINK testified (II R. 598):

> "Q. Do you remember when the Southern Pacific Company, the present company operating these lines, took possession of them?
> A. Yes, sir; it was in 1885."

The witness, after enumerating all the lines which comprised the southern division of the Central Pacific Railroad Company, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona, the Southern Pacific Railroad Company of New Mexico, and numerous branch lines, summarizes (II R. 601):

> "Those corporate properties, in the lines which I have mentioned, constituted the Pacific system of the Southern Pacific Company in 1885."

He further testified (II R. 604):

> "Q. Do you remember, at the time of the lease of the Southern Pacific Company, a copy of which is marked 'Exhibit 20,' and also of the lease of the Central Pacific lines to the Southern Pacific Company, a copy of which is annexed to the bill or petition, and which took effect April 1, 1885, if there was any inventory or schedule prepared of property, rolling stock or other physical property, which was taken over by the Southern Pacific Company?
> A. Yes; there was a very complete inventory taken at that time."

ROBERT A. DONALDSON testified (II R. 625):

> "Q. Did not Mr. Towne exercise jurisdiction all the way through to New Orleans until 1885, when the Southern Pacific Company took possession?

A. My recollection is that he did.

Q. You remember when the Southern Pacific Company took possession of these lines?

A. I do."

He further testified (II R. 627-628):

"Q. Do you remember the operating officials of the Central Pacific Railroad Company at the time the Southern Pacific Company took possession?

A. I do.

Q. Will you name them?

A. Mr. Towne, Mr. Fillmore——

Q. What was Mr. Towne?

A. Mr. Towne, at the time the Southern Pacific took possession, was general manager.

Q. General manager of what?

A. General manager of the Central Pacific Railroad.

Q. The Central Pacific Railroad Company and leased lines?

A. And leased lines, or branches.

Q. Who were the other officials?

A. Mr. Fillmore?

Q. J. A. Fillmore?

A. J. A. Fillmore was, as I remember, general superintendent of the Central Pacific Railroad Company and its branches and leased lines. They were the two chief operating officials.

Q. Who was the general passenger agent?

A. T. H. Goodman.

Q. Were they the same officials for the Southern Pacific Company, when it took possession?

A. When the Southern Pacific Company took possession on the 1st of March, 1885, of the lines south of Goshen, the persons I have named continued in the same capacity with reference to the Southern Pacific Company.

Q. They became officials for the Southern Pacific Company?

A. Yes.

Q. That was what date?

A. March 1, 1885.

Q. Then, as to the lines north of Goshen, those gentlemen were officials of the Central Pacific Railroad Company?

A. They were.

Q. And south of Goshen they were officials of the Southern Pacific Company?

A. They were practically officials of the Southern Pacific Company, because they were operating the properties, with the single exception of what is now known as the Coast Division and was then known to us as the Northern Division of the Southern Pacific road, the local line leading from San Francisco southward toward Gilroy, Tres Pinos and Monterey.

Q. That has no significance here; we are talking about these two lines. Now, on what date did the Southern Pacific Company take possession of the lines of the Central Pacific Railroad Company?

A. April 1, 1885.

Q. What individuals became the operating officials and general officials of the Southern Pacific Company for that line?

A. Under a circular issued by Mr. Towne, as general manager, the officials of the Central Pacific Railroad Company were continued as officials of the Southern Pacific Company."

G. F. RICHARDSON testified (II R. 635):

"Q. How long did the Central Pacific Railroad continue to operate those lines?

A. Until the organization of the Southern Pacific Company in the early part of 1885.

Q. When the Southern Pacific Company took all the lines, and has since continued to operate them?

A. Yes."

R. H. PRATT testified (II R. 481):

"Q. Did the Central Pacific Railroad Company operate trains at any time between New Orleans and San Francisco?

A. It did.

Q. Was it doing that at the time that line was taken over by the Southern Pacific Company; that was in 1885?

A. Yes, sir; 1885; early in 1885."

Again (II R. 493):

"Q. What is the first date at which you had anything to do with the Southern Pacific Railroad?

A. It must have been about 1885, under the Southern Pacific lease.

Mr. Herrin: It was after the lease?

The Witness: After the lease was made, of course."

Petitioner's Exhibit No. 28 (an excerpt from page 223 of the "Travelers' Official Guide" for *June, 1885*) enumerates the lines controlled and operated by the Southern Pacific Company, as follows (P. Ex. 28, IV R. 1522):

"Central Pacific R. R.	1254.24	miles
Northern Ry.	153.63	"
San Pablo & Tulare R. R.	46.51	"
Berkeley Branch R. R.	3.84	"
California Pacific R. R.	115.44	"
Stockton & Copperopolis R. R.	49.00	"
Amador Branch R. R.	27.20	"
Southern Pacific R. R. of California	552.85	"
Southern Pacific R. R. of Arizona	384.25	"
Southern Pacific R. R. of New Mexico	167.30	"
Galves'n, Harrisburg & San Antonio Ry.	936.74	"
Mexican International R. R.	171.00	"
Texas & New Orleans R. R.	105.10	"
Louisiana Western R. R.	112.00	"
Morgan's Louisiana & Texas R. R.	281.00	"
Sabine & East Texas R. R.	104.00	"
Los Angeles & San Diego R. R.	27.60	"
Los Angeles & Independence R. R.	16.83	"
Southern Pacific R. R. of Cal. (No. Div.)	202.50	"
Total Rail Lines	4711.03	miles"

Coincident with the evidence which has just been cited to show the change to Southern Pacific operation in 1885, the witnesses testify, as part of their description of the change, that it produced no alteration whatever in the operating organization or in the managing officials.

The testimony of Mr. Pratt (II R. 489) is typical:

"Q. So one day you were an official of one company and the next day you became the same official of the Southern Pacific Company?

A. I did.

Q. In making that change, was there any change in

the organization or change in salary or change in duties of any official, so far as you know?

The Witness: No changes whatever."

Evidence of a similar nature may be found in the testimony of witnesses Breckenfeld (II R. 460), Englebright (II R. 469), Pratt (II R. 482, 487, 524), Slater (II R. 528), Lister (II R. 531), Luckett (II R. 541), Sheedy (II R. 597), Klink (II R. 601), Horsburgh (II R. 632), Richardson (II R. 635), and Kruttschnitt (II R. 712).

(11) THE OPERATION OF THE LINES AND THE INTERCORPORATE RELATIONS OF THE CORPORATIONS COMPRISING THE SOUTHERN PACIFIC-CENTRAL PACIFIC SYSTEM, FROM APRIL 1, 1885, TO THE FILING OF THE PETITION HEREIN FEBRUARY 11, 1914.

A few facts in relation to the operation of the lines of the Southern Pacific-Central Pacific system, and of the intercorporate relations between the corporations whose lines make up that system, tell all that there is to be told of the period of nearly twenty-nine years prior to the filing of this suit.

The operation during the entire time was by the Southern Pacific Company.

May 14, 1888, the Southern Pacific Railroad Company (of California) absorbed by consolidation proceedings seventeen local lines within the State of California. (See consolidation No. 4, in Petitioner's Exhibit No. 13, IV R. 1288).

April 14, 1898, the Southern Pacific Railroad Company (of California) absorbed by consolidation proceedings three other lines within the State of California. (See consolidation No. 5, in Petitioner's Exhibit No. 13, IV R. 1301).

March 10, 1902, the Southern Pacific Railroad Company (of California) absorbed by consolidation proceedings the Southern Pacific Railroad Company of Arizona and the Southern Pacific Railroad Company of New Mexico, whereupon the Southern

Pacific Railroad Company of California became the owner of the line extending through California, Arizona and New Mexico.

We reserve for later consideration the acquisition in 1901 of forty-six per cent. of the outstanding stock of the Southern Pacific Company by the Union Pacific Railroad Company, dealt with in *United States* vs. *Union Pacific R. R. Co.* (1912), U. S. 61, as that had nothing to do with the operation of the Southern Pacific-Central Pacific system as such, nor with the intercorporate relations of the companies whose lines made up the system.

During the period with which we are now dealing (1885-1914), by acquisition of roads, construction, etc., the Southern Pacific Company became able to send its trains from San Francisco to Los Angeles over its own rails. This first occurred in 1891 with the opening of the west side line in the San Joaquin Valley (Kruttschnitt, II R. 723), and next with the completion of the Coast line in 1901.

Only one other matter requires notice here. In the settlement of the Government debt of the Central Pacific Railroad Company, with which we shall deal hereafter, it became necessary (*a*) for the Southern Pacific Company to subordinate its lease to the lien of a bond issue on the properties of the Central Pacific Railroad Company, made necessary by the settlement of the Government debt, and (*b*) for a new corporation to be created, Central Pacific Railway Company, defendant here, to which the properties of the old Central Pacific Railroad Company were conveyed.

As the result of these changes, the lease to the Southern Pacific Company became subordinated to the bond issue, and the new Central Pacific Company which is defendant here became the proprietor of the leased line.

In no other respect was the operation of the Southern Pacific-Central Pacific system affected in any important particular during the twenty-nine years which preceded the commencement of this suit; nor was there any change in the intercorporate relations of the corporations whose lines make up that system.

(12) GOVERNMENTAL ACTION—CONGRESSIONAL AND EXECUTIVE—BETWEEN APRIL 1, 1885, AND THE PASSAGE OF THE ACT OF JULY 7, 1898 (30 STAT. 652, 659), CREATING THE COMMISSION FOR THE SETTLEMENT OF THE CENTRAL PACIFIC DEBT.

The Pacific Railroad laws, the Thurman Act of May 7, 1878 (20 Stat. 56), and the Act of June 19, 1878 (20 Stat. 169), which created a bureau of the Interior Department in charge of an Auditor of Railroads (whose title was changed by the Act of March 3, 1881 (21 Stat. 409), to "Commissioner of Railroads"), all required, in terms or by necessary implication, that the Central Pacific Railroad Company make periodical accounting of its earnings to the Government. From April 1, 1885, the earnings of the Central Pacific lines were derived under the lease to the Southern Pacific Company of February 17, 1885, and it was necessary, of course, that a copy of this lease should be transmitted as a part of the accounting to the Commissioner of Railroads, and, therefore, that it should be among the files of the Interior Department.

Without proof in terms, therefore, it must be taken as a fact that some time in the year 1885 the Interior Department came into possession of a copy of the lease from the Central Pacific to the Southern Pacific, bearing date February 17, 1885.*

On March 4th of that year (1885) President Cleveland began his first term, and the Senate was in session from March 4, 1885, to April 2, 1885. Congress, however, was not in session until December 7, 1885, when the long session of the 49th Congress commenced.

On January 27, 1886, the following resolution was adopted in the House of Representatives (Congressional Record 1885-6, Vol. 17, Part I, pp. 925-6):

> "*Resolved,* That the Secretary of the Interior be, and is hereby requested to furnish this House with copies

* The Report of the Pacific Railway Commission, October 27, 1885, p. 17, describes the entire transaction of 1885 including the Central Pacific lease to the Southern Pacific.

of any and all contracts or leases which are to be found on file in said Department between the Southern Pacific Company and any and every railroad or railroads to which land grants were made or which received any subsidies from the United States; also a copy of the charter of incorporation of the Southern Pacific Company; also, all and every contract or contracts on file between the Pacific Steamship Company and any and every land grant or subsidized railroad company or companies."

February 5, 1886, the following appears in the proceedings of the House of Representatives (Congressional Record, 49th Congress, First Session, 1885-6, Vol. 17, Part 2, p. 1172):

"PACIFIC RAILROADS.

The Speaker laid before the House the following message from the President of the United States; which was referred to the Committee on Pacific Railroads and ordered to be printed:

'The Speaker of the House of Representatives:

Sir: In response to House resolution of January 27, 1886, "that the Secretary of the Interior be, and is hereby, requested to furnish this House with the copies of any and all contracts or leases which are to be found on file in said Department between the Southern Pacific Company and any and every railroad or railroads to which land grants were made, or which received any subsidies from the United States, also a copy of the charter of incorporation of the Southern Pacific Company, also all and every contract or contracts on file between the Pacific Steamship Company and any and every land-grant or subsidized railroad company or companies," I transmit herewith a communication from the Secretary of the Interior, dated the 2nd instant, inclosing the copies required.

GROVER CLEVELAND.

Executive Mansion,
February 4, 1886."

As printed, this communication with its enclosures became Executive Document No. 60 (House Executive Documents 1885-6, 49th Congress, First Session. Vol. 30), comprising the following papers:*

* Executive Document No. 60 above has not been offered in evidence but we draw upon it as available for our use notwithstanding its absence from the record.

(1) Communication above, President Cleveland to the Speaker of the House, February 4, 1886.

(2) Communication L. Q. C. Lamar, Secretary of the Interior, to the President, February 2, 1886.

(3) Lease Southern Pacific Railroad Company of California to Central Pacific Railroad Company January 1, 1880, for five years from date.

(4) Lease Central Pacific Railroad Company to Southern Pacific Company February 17, 1885, for ninety-nine years from April 1, 1885.

(5) Act of Legislature of Kentucky March 17, 1884, incorporating Southern Pacific Company.

(6) Lease Southern Pacific Railroad Company of New Mexico to Central Pacific Railroad Company, November 17, 1880, for five years from November 1, 1880.

(7) Lease Southern Pacific Railroad Company of Arizona to Central Pacific Railroad Company November 10, 1880, for five years from November 1, 1880.

(8) Agreement between Union Pacific Railroad Company, Central Pacific Railroad Company, and Pacific Mail Steamship Company January 17, 1879.

(9) Agreement between same parties August 6, 1877.

(10) Agreement between Transcontinental Association and Pacific Mail Steamship Company June 1, 1885.

It appears from the foregoing that a copy of the lease of the Central Pacific Railroad Company to the Southern Pacific Company of date February 17, 1885, was laid before Congress twenty-eight years, less six days, before the filing of this suit. We proceed to show that this lease was frequently referred to in congressional proceedings thenceforward until the passage of the Act of July 7, 1898 (30 Stat. 652, 659), creating a commission to settle the Central Pacific indebtedness to the Government.

On March 3, 1887, an act was passed authorizing the appointment of three Commissioners to investigate the affairs of such railroads as had received aid from the Government. The Commissioners made their report to the President on Decem-

ber 1, 1887, E. Ellery Anderson and David T. Littler returning the report of the Commission, and Robert E. Pattison, a minority report. These reports were laid before Congress by the President, January 17, 1888, and constitute Executive Document No. 51, 50th Congress, First Session. The report, including evidence (in ten volumes), was introduced in evidence by the petitioner here and is a part of its Exhibit 22. The report itself (in one volume) was also offered in evidence as Defendants' Exhibit 31. Pages 22 and 23 of the report are devoted to the Central Pacific Railroad Company *and to the leasing of the lines of that company to the Southern Pacific Company in 1885.*

In the report consideration is given to the question whether the properties of the bond-aided lines of the Central Pacific were sufficient to pay the bonds thereon and also the lien of the United States. Upon this subject it was said (p. 23):

> "Taken as a whole, the evidence does not disclose in the subsidized line a capacity for net earnings (meaning thereby the earnings remaining after deducting from gross earnings only operating expenses, taxes, betterments and improvements) which will exceed $3,000,000 per annum. The interest on the first mortgage bonds applicable to the aided road, with a reasonable allowance for new construction and betterments, will amount to $2,000,000 per annum. The report of Colonel Morgan, based on an examination of the physical condition of the road, and after a careful scrutiny of its earning capacity, has led him to the conclusion that a fair valuation of this property (meaning thereby the entire Central Pacific Railroad as at present consolidated, its equipment, terminals, and shops), is $110,000,000. This estimate, in the judgment of the Commission, is excessive and out of proportion with the cost of reproduction as fixed by Colonel Morgan, which is $50,863,540.
>
> The statutory lien given to the United States, under the case cited above (*United States against the Kansas Pacific Railway Company,* 99 U. S., p. 455), is limited to that portion of the railroad in consideration of which the bonds were issued—that is to say, it applies only to the road between Ogden and San Jose, and has no application to any of the branches or leased lines. All that has been said in regard to the unsatisfactory na-

ture of the statutory lien in the case of the Union Pacific Railway Company applies with equal force to the Central Pacific Railroad Company."

Again, at page 25, it was said:

> *"In the judgment of the Commission the value of the property subjected to the statutory lien, taken by itself and without the auxiliary aid to be derived from the connecting lines, would not be sufficient to more than pay the indebtedness which is prior to the claim of the United States."*

The report just mentioned, known as the Report of the U. S. Pacific Railway Commission, was referred to a special committee of the Senate and the committee submitted a report, February 17, 1890, consisting of 78 pages—pages 1 to 24, presented by Mr. Frye, and pages 25 to 78, presented by Mr. Davis. For convenience we shall hereafter refer to this report as the Frye-Davis Report (D. Ex. 32; Sen. Doc. 293, 51st Cong. 1st Sess., Feb. 17, 1890).

The portion of the Frye-Davis Report dealing with the Southern Pacific Railroad Company commences at page 25; *a copy of the lease from the Central Pacific to the Southern Pacific, dated February 17, 1885, appears at page 52; and a copy of the modification of that lease, dated January 1, 1888, appears at page 55.*

At page 48 of the Report, mention is made of the report of the Railway Commission to the point that the bond-aided lines of the Central Pacific Railroad Company are not equal in value to the outstanding bonds and the lien of the Government thereon. At page 51, mention is made of "various plans and suggestions for the adjustment of the financial relations of the United States" with the Central Pacific Railroad Company, *among others that "all the associated lines forming the Southern Pacific Company (and those include the Central Pacific as consolidated) become parties to obligations" for the refunding of the debt.*

At page 52, the Committee says:

> "The committee is of the opinion that the present security of the United States upon the property of the Central Pacific Railroad Company is inadequate; *that*

> *such property in case of the foreclosure of the first mortgage thereon will be substantially exhausted in satisfaction thereof,* and that it is inexpedient for the United States to redeem the property from said first mortgage or to become the owner of such property through process of redemption and foreclosure.
>
> That it is expedient, necessary, and practicable to adjust and secure the indebtedness to the United States by a security upon extended time and at a reduced rate of interest within the ability of the company to pay the debt upon such terms 'as to advance the development of the country through which said roads pass, and afford the inhabitants thereof reasonable rates of transportation for passengers and freight'."

And at page 61, speaking of the suggestion that the Southern Pacific Company should guarantee the refunded debt of the Central Pacific, the Committee says that:

> *"In view of possible guaranties being made by the associated lines, it is of importance to know the earning power and prior obligations of these lines, with a view of estimating the value of the security for any guaranties made by them."*

The Report thereupon purports to show the accumulated surplus, etc., of the SouthernPacific Company, with a view to showing that with the guaranty of the Southern Pacific Company the indebtedness to the Government would be fully secured.

On October 13, 1893, receivers for the Union Pacific were appointed, and on that day a resolution was passed by the Senate, evidently without knowledge of the fact that receivers had that day been appointed, authorizing its Committee on Pacific Railroads to investigate the question as to whether receivers had been appointed for the Union Pacific and related matters, under which the so-called Brice Report, hereinafter mentioned, was made.

The next matter is the report of Mr. Reilly from the House Committee on Pacific Railroads, dated July 21, 1894, known as H. R. 1290, 53rd Congress, Second Session, which is Defendants' Exhibit 34. This report recommended the passage of a pending bill to refund the Union Pacific and Central Pacific

debts, and it dwells upon the impracticability of foreclosure and the inadequacy of the property to pay the bonds and lien of the Government thereon.

Next came the Brice Report, which is Defendants' Exhibit 33, Senate Report 830, 53rd Congress, Third Session, submitted January 28, 1895, by Mr. Brice on behalf of the Committee on Pacific Railroads under the Resolution of October 13, 1893. It was intended to lay before Congress all matters respecting the Union Pacific and Central Pacific Railroads, in advance of concrete recommendations. *This report* (pp. 95-7) *refers to all of the leases between the Central Pacific and Southern Pacific which are attached to the petition herein except that of April 15, 1897, which had not then been executed.*

The report says (p. 101) :

> "The security possessed by the United States for the indebtedness of the Central Pacific Railroad Company is, as shown by the table above, a second mortgage on the line of road from a point 5 miles west of Ogden to Sacramento, together with the rolling stock, fixtures, etc., and a like mortgage upon the old line of the Western Pacific Railroad Company from Sacramento down to San Jose, the connection between these lines of road being made over an unsubsidized piece of road about 5 miles long on which the Government has no lien at all. Just what this lien is worth, under the circumstances and in view of the depressed condition of business, it is difficult to state. As in the case of the Union Pacific, the Government lien is not on any of the valuable terminal properties of the company. It does not reach San Francisco at all. In fact, the traffic of the Central Pacific to and from the east at San Francisco, including the United States mail, does not go over the old line of the Western Pacific at all, but is taken by the Southern Pacific Company, over its leased line of the California Pacific, from Sacramento to Vallejo, and thence by steamers to San Francisco, or *vice versa;* or, the traffic if it goes at all over the old Western Pacific line, leaves that line at Niles and goes thence over the unsubsidized lines of the Central Pacific to Oakland and San Francisco, or *vice versa.* So that, without the necessary terminal facilities at San Francisco, the value of the road upon which the Government lien exists is hard to estimate."

On April 17, 1896, 54th Congress, First Session, Mr. Gear introduced Senate Bill 2894 (D. Ex. 36) to refund the debts of the Pacific Railroads (both Union Pacific and Central Pacific).

Section 19 of this bill reads as follows (D. Ex. 36, V R. 1935-1936):

> *"That the said Central Pacific Railroad Company shall arrange for having the lease now existing between it and the Southern Pacific Company modified so that the Southern Pacific Company shall guarantee the payment by the Central Pacific Railroad Company during the continuation of such lease of the interest on, and the installments on account of principal of, the bonds issued under the tenth section of this Act,* as prescribed in the tenth and eleventh sections hereof, and so that in case the Southern Pacific Company should consent to the termination of such lease before the maturity of all such installments payable on account of principal of said bonds, it shall, in that event, guarantee the payment by the Central Pacific Railroad Company of such interest and installments on account of principal while any bonds issued under the tenth section of this Act shall remain outstanding, and so that said Southern Pacific Company shall consent that the sums amounting in the aggregate to about two million four hundred and thirty-nine thousand dollars, standing credited on the books of the Treasury of the United States to the Central Pacific Railroad Company as compensation for services upon non-aided lines (a portion of which is now in judgment in favor of the Southern Pacific Company), shall be forthwith applied to the payment and cancellation of the highest numbered bonds of the Central Pacific Railroad Company issued under the provisions of said tenth section of this Act, and the filing with the Secretary of the Treasury of a duplicate original of such modified lease, duly executed by the officers of both said companies by authority of their boards of directors, shall constitute an essential part of the acceptance by the Central Pacific Railroad Company of this Act. In the event of the termination of such lease by act of the parties thereto, or any abrogation or cancellation of such lease, the principal of the bonds issued under the tenth section of this Act shall, at the option of the President of the United States, immediately mature."

April 25, 1896, 54th Congress, Second Session, Mr. Powers introduced H. R. 8189 (D. Ex. 38, V R. 1939), a bill with similar object, *i. e.,* to refund the Union Pacific and Central Pacific debts. This bill contained a section similar to the section of the Gear bill, that has just been quoted.

On April 25, 1896, Mr. Powers, on behalf of the Committee on Pacific Railroads, submitted a report, H. R. 1497, 54th Congress, First Session (D. Ex. 37), in which it was recommended that H. R. bill 8189, above mentioned (D. Ex. 38), do pass. This last mentioned report, which we shall call the Powers Report, reviews the whole situation in respect of the indebtedness of the Pacific Railroads to the United States and, as an argument for the refunding of the indebtedness with supplementary security, it is pointed out, among other things, that the properties of the Central Pacific are not sufficient to pay the bonds and lien of the Government thereon.

In respect of the provision of the recommended bill relating to the Central Pacific, the Powers Report says (p. 9) :

> "In the case of the Central Pacific the Government's lien is extended so as to include within the properties mortgaged as security for the new bonds the non-aided line extending from Niles to Oakland (on the Bay of San Francisco), together with the local lines, terminal properties, and real estate in San Francisco, Oakland, and Alameda, steamers, ferryboats, and equipment of ferries, which constitute the great terminals of the Central Pacific Railroad Company in and near San Francisco, and so as to include the great feeders and distributers for the main line of road—that is to say, the line extending northerly from the main line at Roseville to the Oregon boundary, about 296 miles in length, and the line extending southerly from Lathrop to Goshen, about 146 miles in length, and also the interest of the Central Pacific Railroad Company in its land grant under the acts of 1862 and 1864. The provisions of the bill will thus substitute a lien upon the complete and finished road with all its terminal facilities and its great feeders and distributors north and south of the main line for the existing lien, which rests only upon a headless and armless trunk extending from a point near Ogden to San Jose.

OBLIGATIONS TO BE ASSUMED BY SOUTHERN PACIFIC COMPANY.

As the average of the net earnings of the Central Pacific property is less than the amount imposed by this bill, the committee has required, as one of the terms of the settlement, that the lease of the Central Pacific Railroad to the Southern Pacific Company should be so modified as to require, first, that the Southern Pacific Company should guarantee the full payment of the requirements imposed upon the Central Pacific under this act so long as it should remain lessee of the property; and, second, that if the Southern Pacific Company should consent to the termination of the lease before the maturity of all installments payable under the act, it should in that event guarantee the payment by the Central Pacific Railroad Company of all requirements imposed upon it by the act, and has provided that in case of any abrogation or termination of the lease the principal of all the bonds issued under the act should, at the option of the President of the United States, immediately mature."

On May 1, 1896, Mr. Gear, on behalf of the Committee on Pacific Railroads, submitted to the Senate a report known as S. R. 778, 54th Congress, First Session, in which the Committee recommended the passage of the above-mentioned Senate Bill 2894 (D. Ex. 36). This report by Mr. Gear, which we shall hereafter call "Gear's 1896 Report", is Defendants' Exhibit 35.

In the course of this report (Gear's 1896 Report), it is said (p. 3):

"Some time after the Government commenced its payments of the interest upon the subsidy bonds the question arose whether the companies were not bound to reimburse the Government currently for this payment. The Supreme Court decided the question in the case of *The Union Pacific Railroad Company* v. *United States* (91 U. S. 72), holding that nothing beyond the one-half of the compensation for transportation service and the 5 per cent. of net earnings was payable to the United States on account of interest until the maturity of the respective bonds.

Soon after this the Thurman Act, of May 7, 1878 (20 Stat. L. 56), was passed. In substance, this provided that the whole compensation for Government serv-

ices should be retained; one-half to be applied to the bond and interest account, the other half to go into a sinking fund, to which sinking fund should also be paid certain prescribed sums or so much thereof as should make the whole Government requirement at least equal to 25 per cent. of the net earnings of the road.

The provisions of this act have been fully complied with by both the Union and Central Pacific railroad companies.

The sinking fund, however, has not met public expectation. It was principally invested in Government bonds, bought at an excessive premium, some as high as 135; in fact, up to about 1887 the sinking fund lost money, and the amount thereof was less than the absolute amount which the companies had paid in; but since then, as the fund has been invested partly in the first-mortgage bonds of the companies, there has been a small increase in the fund above the amount of cash paid into it by the respective companies."

The Committee then proceeds to recommend that there be an extension of the time for the payment of the debt due by the companies to the Government, and says (p. 7):

"In prescribing the amounts to be paid by the companies the committee has fixed amounts as large as could, in its judgment, be expected to be paid out of the reasonably anticipated earnings of the companies. We have not desired to fix amounts in excess of the earning capacity of the properties, as we have considered it desirable and in the highest degree important that the arrangement made now should be a final one, but the amounts have been determined according to the best estimates which could be made of the earning capacity of the properties, and, while we believe that the amounts required by this bill can be met and borne, we are satisfied that these amounts could not be materially increased without exceeding the limits of reasonable safety.

The committee has, however, made in the case of the Central Pacific Railroad Company the special requirement that the lease of its properties to the Southern Pacific Company should be so modified as to provide as follows:

First. That the Southern Pacific Company shall guarantee the payment, during the continuance of the lease, of the amounts payable under the bill.

Second. That in case the Southern Pacific Company should consent to the termination of the lease before the maturity of all amounts payable under the bill it shall guarantee the payment of all such amounts thereafter to mature.

Third. That the Southern Pacific Company should consent that sums amounting in the aggregate to upward of $2,400,000, standing credited on the books of the United States Treasury to the Central Pacific Railroad Company as compensation for services upon nonaided lines, should be applied to the payment and cancellation of the bonds issued under the act.

Under the latter requirement the amounts applied to the cancellation of Central Pacific bonds the first year will be about $4,000,000, and the Southern Pacific guaranty will, in the judgment of the committee, fully insure the payment of the whole Central Pacific debt according to the provisions of the bill reported by the committee."

On January 8, 1897, C. P. Huntington wrote a letter reading as follows:

"Hotel Normandie, WASHINGTON, D. C.
January 8, 1897.

DEAR SIR: As heretofore requested by you, I send herewith a copy of the lease of the Central Pacific Railroad to the Southern Pacific Company and amendments thereto, to date, viz.:

Original lease, February 17, 1885.
Modification of lease, January 1, 1888.
Modification of lease, December 7, 1893.
Modification of lease, March 22, 1894.

I remain, yours, truly,
C. P. HUNTINGTON.

Honorable J. H. Gear,
Chairman Railroad Committee,
United States Senate, Washington, D. C."

(The lease and amendments are those which are set forth as an exhibit to the petition in this case.)

This letter from Mr. Huntington to Senator Gear is Defendants' Exhibit 41 and constitutes Senate Document 61, 54th Congress, Second Session, submitted to the Senate by Mr. Gear on January 13, 1897, and introduced in evidence in that form (III R. 922).

On January 11, 1897, in the closing days of the 54th Congress, Mr. Powers H. R. Bill 8189 (D. Ex. 38), mentioned *supra,* page 103, came to a vote on final passage, and was defeated by a vote of yeas 103, nays 168, not voting 84 (Congressional Record, 54th Congress, Second Session, Vol. 29, Part I, pp. 689-90). It had become apparent at this time that the opposition to extending the debts of the Union Pacific and Central Pacific for a long period of time and the details of such an adjustment presented a problem so complicated that it would be impossible for Congress to take direct or immediate action upon the subject.

Therefore, on January 13, 1897, Mr. Gear presented a bill for the appointment of a commission to settle the debts of all the bond-aided Pacific railroads, the commission to be composed of the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General. This is Senate Bill 3522, 54th Congress, Second Session (D. Ex. 44).

On March 4, 1897, the 54th Congress and the second administration of President Cleveland came to an end, and the administration of President McKinley began. Immediately after his inauguration, the President ordered a special session of Congress, which convened March 15, 1897.

On March 16, 1897, Mr. Gear introduced Senate Bill 119 for the appointment of the Commission consisting of the Secretary of the Treasury, Secretary of the Interior, and the Attorney General, to settle the debt of the bond-aided Central Pacific railroads*.

* It is to be noted at this point that the first measure introduced in Congress which separated the adjustment of the Union Pacific debt from the adjustment of the Central Pacific debt was Senate Bill 119, introduced March 16, 1897. By that time it had become apparent that the two roads were to be dealt with separately. Indeed, later in the same year, November 1, 1897, the Union Pacific Railroad was struck off in foreclosure for the sum of $58,448,223.75, being the total amount due to the Government (Attorney-General's Report 1897, pp. vi.-vii.; *id.* 1898, p. xv.). The Kansas Pacific (Kansas City-Denver-Cheyenne line) was struck off February 16, 1898, for a sum which realized to the Government the whole amount of the principal of its debt, viz., $6,303,000, leaving the Government other means of reimbursement for the interest it had paid on the bonds and which was not recovered in the foreclosure (Attorney-General's Report 1898, pp. xvi, xvii; *id.* 1899, p. xxxii.).

On April 1, 1897, Mr. Gear presented the report of the Committee on Pacific Railroads in support of his Senate Bill No. 119. This report, which we call the Gear 1897 Report, is the first part of Senate Report 20, 55th Congress, First Session, and constitutes Defendants' Exhibit 39. The second part of this same report, which is a minority report of Mr. Morgan against Senate Bill 119 and in favor of a measure introduced by him March 16, 1897, is Petitioner's Exhibit 23 A.

The Gear 1897 Report, recommending the passage of Senate Bill 119, the first measure providing for the separate adjustment of the Central Pacific debt, gives the reasons for making the adjustment of the Central Pacific debt the subject of independent legislation.

The following extracts are taken from the report:

> The bill referred to the committee and reported to the Senate by it deals only with matters affecting the claims growing out of the issue of the so-called subsidy bonds of the United States to aid in the construction of the Central Pacific Railroad from Sacramento to a point 5 miles west of Ogden and the Western Pacific Railroad from San Jose to Sacramento. All matters affecting the claims arising out of the issue of subsidy bonds in aid of the construction of the Union Pacific and Kansas Pacific railroads are now pending before the courts for judicial adjustment thereof (pp. 1 and 2).
>
> . . . . . .
>
> The time has passed during which it seemed practicable to deal in a single act with the liens of the United States upon the respective railroads included within the Central Pacific system and the liens upon the respective railroads included within the Union Pacific system.
>
> The Union Pacific Company, as early as 1894, made default in the payment of interest upon the coupons appertaining to its first mortgage bonds, and ever since that date has been in default in respect of payments due on account of interest or principal of its first mortgage bonds.
>
> As early as 1895 foreclosure suits were instituted by the trustees of the first mortgages, superior to the Government lien, and such foreclosure suits are being pressed to decree and sale. The United States, acting by its Attorney General, under directions of the Presi-

dent, has commenced proceedings to enforce the liens reserved to the United States to secure the repayment of the subsidy bonds issued in aid of the construction of the Union Pacific and Kansas Pacific railroads, and has filed answers in the foreclosure suits instituted by the trustees of the paramount first mortgages thereon, and it is claimed that decrees of sale under the first mortgages and the Government liens will probably be entered in the course of the coming summer.

In the case of the Central Pacific Railroad a different course has been pursued. The coupons appertaining to its first-mortgage bonds have been regularly paid at maturity, and as each installment of first-mortgage bonds has matured, arrangements have been made with the bondholders to extend the maturity of the principal of each installment of bonds until January 1, 1898, at which last mentioned date, under existing arrangements, first-mortgage bonds of the Central Pacific Railroad Company to the amount of $25,883,000 will mature. The first-mortgage bonds of the Western Pacific Railroad Company, secured by a first mortgage upon its bond-aided line, and aggregating $1,970,000, will mature on the 1st day of July, 1899.

While the earnings of the Central Pacific Railroad Company have been such as to enable it to meet its operating expenses and the interest upon the first-mortgage bonds upon its aided line and the liens upon its non-aided lines (upon which the lien of the mortgage in favor of the United States does not attach), they have been and are of course, wholly insufficient to enable it to provide for the vast debt to the Government, secured by a second lien upon the aided line. The institution of proceedings for foreclosure of the lien of the United States would undoubtedly be followed, from the necessities of the case, by the institution of suits to foreclose the first mortgages upon the Central Pacific and Western Pacific aided lines, amounting in the aggregate, as already stated, to $27,853,000.

It is believed, however, that a result much more advantageous to the United States can be reached by agreement with the railroad company than would be reached by a foreclosure of the second lien held by the Government, subject to this large first-mortgage lien, or by the foreclosure of the first mortgage and the Government liens concurrently.

The inability of the Pacific railroad companies to provide for the repayment to the United States of the

principal and interest of its subsidy bonds has been long fully anticipated and foreseen, and for many years Congress has had under consideration, at each session, measures designed to provide for a readjustment or extension of the indebtedness upon terms which it was supposed would be within the earning capacity of the various companies to meet. The subject has been carefully considered from time to time by various Congressional committees, which, on several occasions, have reported bills for this purpose, which received the cordial support of the committees which had given consideration to the subject, and investigated the existing situation, and ascertained the earnings and resources of the companies, upon which the character of the provisions to be made in respect to the matter were necessarily dependent.

In each instance, however, the proposed bills have failed, either on account of failure of the Houses of Congress to reach them for consideration, or on account of adverse action, which it is believed was predicated, to a controlling extent, upon the conviction that Congress, with the vast multiplicity of matters constantly demanding its attention, could not devote the requisite time to the careful consideration of the many diverse elements affecting this question and necessarily affecting any specific plan devised for its adjustment. So far as Congress may be considered to have spoken at all in reference to this question, it has only been to the extent of indicating that, in its judgment, the conditions affecting the determination of the question involved were so complicated that it had been unable to reach a conclusion satisfactory to itself in respect thereto.

The committee, therefore, considering the history of previous measures affecting this subject, has concluded that it would probably best express the wishes of Congress in respect to the matter if a plan were reported which would permit three executive officers of the Government, subject to the approval of the President, to reach an adjustment with the owners of the property in respect to the settlement of this indebtedness. This conclusion has been reached with no disposition to forestall or prevent determinate action by Congress itself in respect to specific plans, but only after Congress had itself, as it seemed to the committee, practically indicated its determination that the conditions affecting the subject were of such a character as to lead to the conclusion that the whole subject should be considered and dealt

with by officers of the United States having opportunity and facility to investigate all facts bearing upon the matter, and who would be able to deal with it more directly and satisfactorily than it could be expected that the subject could be dealt with by legislative procedure; and this view of the matter commends itself to the judgment of the committee as being a suitable, wise and appropriate method for reaching, through the responsible officers of the Government, an adjustment of a matter surrounded with not inconsiderable difficulties and embarrassments (pp. 4 and 5).

. . . . . .

The officers designated in the bill reported by the committee to act on behalf of the United States in respect to this matter are the Secretary of the Treasury, the Secretary of the Interior (within whose Department is included the Commissionership of Railroads), and the Attorney-General, and the act proposes that these officers, subject to the approval of the President, should have power to settle, upon such terms as may be satisfactory to them, or a majority of them, the indebtedness to the Government growing out of the issue of subsidy bonds in aid of the construction of the Central Pacific and Western Pacific railroads (p. 6).

. . . . . .

The committee is confident that the Secretary of the Treasury, the Secretary of the Interior, and the Attorney-General of the United States, sitting together as a commission, can be relied upon to reach a satisfactory conclusion in the light of events as they may from time to time develop as to the result which may be reasonably anticipated from instituting proceedings for the foreclosure of the Government's lien upon the properties involved, and they may be confidently relied upon to make a settlement with the owners of the properties under the authority conferred upon them by the bill now reported only if they believe that a settlement so reached would be more advantageous to the interests of the Government than the result which may be reasonably anticipated from the institution of foreclosure proceedings. And for this reason we deem it most important that these officers should be invested with authority to make such a settlement if they should reach the conclusion that such a settlement was more advantageous to the United States than the anticipated re-

> sult of judicial proceedings for the enforcement of the lien of the United States upon the properties involved, and the Government should not be forced to reluctantly commence proceedings to foreclose the Government's lien upon the properties for want of authority to make a settlement with the owners which might be obviously more advantageous to the United States than any reasonably anticipated result of foreclosure proceedings." (p. 10.)

On July 12, 1897, Mr. Hepburn introduced H. R. 3750, 55th Congress, First Session, which is Defendants' Exhibit 45. This bill also provides for the settlement of the debt by a Commission composed of the same three officers.

On July 24, 1897, the First Session of the 55th Congress (special session) adjourned without the adoption of Senate Bill 119.

On November 1, 1897, in the Union Pacific foreclosure that road was struck off for the sum of $58,448,223.75, being the total amount due to the Government (Attorney General's Report 1897, pp. vi.-vii., Attorney General's Report 1898, p. xv.), so that when the 55th Congress convened in first regular session the debt of the Union Pacific to the Government had been discharged, leaving open the debt of the Kansas Pacific (Kansas City-Denver-Cheyenne line) and the debt of the Central Pacific.

On December 7, 1897, the second session of the 55th Congress, being the first regular session, was convened, and in the course of that session, March 22, 1898*, an amendment to Senate Bill 119, making it more nearly conform to the later enactment of July 7, 1898, was introduced by Mr. Gear (D. Ex. 40, V R. 1959).

Senate Bill 119, however, was not voted on as such, for its provisions were incorporated in the Deficiency Appropriation Bill of 1898.

On June 29, 1898, the Senate had the Deficiency Appropriation Bill under consideration (Congressional Record, 55th Congress, Second Session, Vol. 31, Part 7, pp. 6448, 6451, 6458).

* The Kansas-Pacific debt had already been struck off on February 16, 1898, as appears from the preceding note (p. 107).

Mr. Morgan, on behalf of the Committee on Pacific Railroads, offered an amendment thereto substantially the same as the law of July 7, 1898, except (*a*) that it contained a provision that the funds derived from the Union Pacific settlement and to be derived from the Central Pacific settlement should constitute a fund for the building of the Nicaragua Canal (pp. 6458, 6459), (*b*) that it did not put a limit upon the time within which the debt of the Central Pacific should be paid, and (*c*) there was no provision for foreclosure if the settlement was not perfected within one year.

In the course of his remarks in support of his own proposed amendment, Mr. Morgan said (referring to the question of the time within which the payment should be made):

> "I am entirely satisfied on my own behalf to let the matter stand just as it is, and to let the President of the United States and the commission fix the time. But a time has been agreed upon on the suggestion of a Senator who is not a member of the committee, which is that in ten annual payments, as I understand it, this $59,000,000 is to be paid. Well, that is a pretty drastic movement, I know; we all know that even the greatest railroad company in the United States would find much difficulty, out of its earnings, or even out of its credit, in raising the sum of $59,000,000 in ten payments—very great difficulty. But that is neither here nor there."

Mr. Morgan's proposed amendment did not prevail, and thereupon another amendment was proposed by Mr. Gear, in the form in which the Act was approved on July 7, 1898, except in two particulars: (*a*) it did not limit the time within which the indebtedness should be paid to ten years; and (*b*) it did not provide that if the settlement were not perfected within one year after the passage of the act there should be foreclosure. At the suggestion of Mr. White of California, the provision respecting the ten-year limit was accepted by Mr. Gear and became a part of his amendment. Thereupon the amendment became a part of the Deficiency Appropriation Bill and was passed in the Senate, June 29, 1898. The amendment respecting foreclosure in the event settlement was not perfected within one year was introduced in the House (Congressional Record, 55th Congress, Second Session (first regular session), July 6,

1898, Vol. 31, Part 7, p. 6731). The amendment providing for foreclosure if the settlement was not perfected in one year was moved by Mr. Barham of California. The discussion upon the subject was closed by Mr. Cannon, and the amendment adopted by the House.

Mr. Cannon said (p. 6731):

> "Mr. Cannon. Now, Mr. Speaker, in the remaining two minutes that I have I want to say that the right to foreclose remains when this provision is adopted, if it shall be adopted, and it leaves the three cabinet officers, with the approval of the President, to agree with the Central Pacific Railroad on the payment of the full amount in twenty semi-annual payments, giving them discretion as to the best security they can get. They can make that arrangement with the Southern Pacific, or with the Union Pacific, or with the Rock Island, or with the Northwestern, or with anybody under God's green canopy that they choose. (Laughter.) Well, it is a question of eyesight whether the canopy is green or blue.
>
> Now, Mr. Speaker, the hour of 4 o'clock has come, and I trust that this amendment will be adopted, and this additional means taken to secure $60,000,000 to the Treasury of the United States without one danger of loss."

The amendment was adopted and the Senate concurred. On the following day, the President signed the bill; and thus the Act of July 7, 1898, became a law.

(13) THE ACT OF JULY 7, 1898 (30 STAT. 652, 659), AND THE PRELIMINARY NEGOTIATIONS WHICH LED TO THE SETTLEMENT OF FEBRUARY 1, 1899 (EXECUTED FEBRUARY 16, 1899), TOGETHER WITH PLANS FOR THE READJUSTMENT OF THE CENTRAL PACIFIC RAILROAD COMPANY, ALL OF WHICH IMMEDIATELY BECAME MATTER OF GENERAL AND PUBLIC KNOWLEDGE.

Attorney General Griggs testified to negotiations which resulted in the agreement dated February 1, 1899, conducted

chiefly with James Speyer, of Speyer & Company of New York; "and I recall now one occasion when the matter was discussed by Mr. Huntington, who, I think, was then president of the Southern Pacific Railroad", at the Cabinet Room in the presence of President McKinley (III R. 992-993). He testified further that President McKinley had spoken to him of "having conferred with Mr. Huntington and having seen him about the matter" (III R. 997).

Attorney General Griggs also testified that President McKinley took an active part in the settlement and kept in touch with the progress of the negotiations, as he regarded it a very important subject, and had expressed great interest therein (III R. 1009).

Secretary of the Treasury Gage testified that although he had very little to do with the negotiations, he was familiar with what was going on; that he had several conferences with President McKinley concerning the matter; that the President was active in the settlement, and that the first that Mr. Gage knew of the negotiations was the statement from the President of a visit paid to him by Mr. Huntington. Mr. Gage had frequent conferences with the Attorney General about the matter (III R. 1010).

Henry Ruhlander, a member of Speyer & Company, testified that the leading spirit in the negotiations for this settlement was C. P. Huntington (III R. 930).

James Speyer testified that he conferred with Attorney General Griggs, and that the "principal negotiations were with President McKinley personally . . . I should say that I saw President McKinley probably half a dozen times" (III R. 1187). Mr. Speyer also testified regarding his dealings with Mr. Huntington, that:

> "My dealings with Mr. Huntington were, as I say, as to the Southern Pacific Company. I do not remember dealing with him at all as a Central Pacific stockholder" (III R. 1195).

Mr. Speyer further testified that the entire plan for the reorganization of the affairs of the Central Pacific had been all agreed upon and arranged and was ready to be put out as a

public document under date of February 20, 1899, and that shortly before that time he became nervous lest the agreement should not be actually executed before February 20, 1899, and that he therefore went to Washington to see to its execution. The agreement was executed in Washington by President McKinley and Secretary Bliss and Attorney General Griggs on February 15, 1899, and in Boston by Secretary Gage on February 16, 1899 (III R. 1186, 1213-1215).

Immediately after the execution of the agreement with the Government, which is Exhibit "A" to Defendants' Answer, the Commission, consisting of Secretary of the Treasury, Secretary of the Interior, and the Attorney General, transmitted to Congress their report dated February 15, 1899, setting forth in full a copy of the agreement of February 1, 1899. *This report was received by the Senate and House of Representatives and ordered to be printed on February 20, 1899* (D. Ex. No. 53).

On February 18, 1899, the *Commercial & Financial Chronicle* published an announcement of the readjustment plan of the Central Pacific Railroad Company (D. Ex. 95, VI R. 2258).

On February 20, 1899, Speyer & Company issued the entire plan for the readjustment of the Central Pacific for the payment of the Government debt, and gave it wide publicity (III R. 1187).

On February 25, 1899, the *Commercial & Financial Chronicle* published an exhaustive account of all of the details of the readjustment as they were actually accomplished.

The *Commercial and Financial Chronicle* just mentioned is a weekly newspaper devoted to commercial and financial affairs, published weekly on Saturday in the City of New York, and has been in existence for 25 years. This paper had throughout the year 1899, and for many years before that time, a large circulation among commercial and financial people and banks in the United States of America. It is one of the leading commercial and financial papers of the country (III R. 1211).

Having narrated the circumstances of the consummation of the settlement with the Government, and the immediate publicity given to it, it is next in order to consider the settlement itself.

(14) THE SETTLEMENT WITH THE GOVERNMENT DATED FEBRUARY 1, 1899, BUT ACTUALLY EXECUTED FEBRUARY 16, 1899.

The settlement with the Government constitutes Exhibit "A" to the Answer of Defendants, and the plan of readjustment of which the agreement was an integral part, is Exhibit "B" to the Answer.

With a view to a full understanding of the transaction it is necessary first to consider the condition of the Central Pacific Railroad Company as of February 1, 1899.

The Financial Condition of the Central Pacific Railroad Company (the old Company) as of February 1, 1899.

The condition may be briefly put as follows:

(*a*) Bonded debt, made up of seven issues (for details of which see Answer, I R. 61-62).	$57,471,000.00
(*b*) Indebtedness to the Government (Answer, I R. 51)	58,812,715.48
(*c*) Par of its outstanding stock (Answer, I R. 66)	67,275,500.00
TOTAL	$183,559,215.48

In order that the indebtedness of the Government should be met it was, of course, necessary to reorganize the company, and a reorganization of the company could only be accomplished by an adjustment with all interests concerned. To do this it was necessary to organize a new company and for that new company to issue and, in large part, to market new securities.

It is, therefore, necessary to know what the securities of the new company were and how the reorganization was effected.

The Security Issues of the Central Pacific Railway Company (the new Company).

(*a*) 4% First Refunding Mortgage Gold Bonds, guaranteed unconditionally as to principal and interest by the Southern Pacific Company	$100,000,000
(*b*) 3½% Mortgage Gold Bonds, guaranteed unconditionally as to principal and interest by the Southern Pacific Company	25,000,000
(*c*) 4% Cumulative Preferred Stock	20,000,000
(*d*) Common Stock	67,275,500
TOTAL	$212,275,500

We have thus set down the obligations of the old company and the securities to be issued by the new company. The question now arises, How could the new company with the securities just mentioned meet and discharge the obligations of the old company? This was accomplished by the intervention of the Southern Pacific Company and through its engagements made with Speyer & Co.

As already noted, the Southern Pacific Company agreed that it would guarantee unconditionally the payment of the principal and interest of the two issues of bonds of the new company; but the Southern Pacific Company did more than this. It agreed to buy the $20,000,000 issue of preferred stock and the $67,275,500 issue of common stock.

The stock of the new company, $20,000,000 preferred and $67,275,500 common, was to be purchased by the Southern Pacific Company with 4% Gold Bonds to be issued by that Company to the amount of $36,819,000 (secured by a pledge of the preferred and common stock of the new Central Pacific, as and when acquired) and an issue of its own (the Southern Pacific) common stock to the amount of $67,275,500. The

$20,000,000 issue of preferred stock was to be paid for by $20,000,000 of the Southern Pacific 4% Gold Bonds just mentioned. The $67,275,500 issue of common stock was to be paid for by $67,275,500 of the common stock of the Southern Pacific (par for par) plus $16,819,000 of its 4% Gold Bonds. In other words, the Southern Pacific paid $125 per share for the stock of the new Central Pacific—$100 in common stock of the Southern Pacific Company at par and $25 in bonds of the last mentioned issue to be taken at par.

It is to be noted that the $20,000,000 in bonds of the Southern Pacific to be paid for the preferred stock and the $16,819,000 in bonds of that company to be paid on account of the purchase of the common stock cover the entire issue of Southern Pacific 4% Gold Bonds aggregating $36,819,000 face value.

It is also to be noted that the Southern Pacific was presently to acquire only $12,000,000 of the $20,000,000 of preferred stock and that the remaining $8,000,000 was to be acquired by the Southern Pacific from the Central Pacific Railway Company as and when the needs of the latter company should require their sale to the former company for the 4% Gold Bonds of that company.

The plan just outlined provided a purchaser for the stock of the Central Pacific Railway Company (the new company) but it did not provide cash for the stockholders in the old company if they demanded cash in place of new securities; it did not provide cash for the holders of the bonds of the old company if they demanded cash, and it did not provide cash for the Government, which did demand cash while consenting that the payments might be deferred. It, therefore, became important to procure a syndicate ready to buy and pay cash for the bonds of the old Central Pacific and for its outstanding stock, unless the holders of those bonds and stocks were minded to accept new and other securities in lieu thereof; and also ready to purchase and pay for the new securities in amounts and at times necessary to meet the requirements of the settlement with the Government. In other words, a syndicate was

necessary (*a*) to make a market for a sufficient amount of the new securities to meet the requirements of the Government; (*b*) to purchase for cash the outstanding stocks and bonds of the old company, and (*c*) to take in lieu of the stocks and bonds of the old company so to be acquired such payment in cash and new securities as might be arranged in the readjustment plan. This was all arranged by Speyer & Co., actuated by the engagements and liabilities of the Southern Pacific Company represented in the matter by C. P. Huntington.

How the matter was worked out is easily shown.

We deal first with the settlement with the Government.

Settlement with United States Government.

The indebtedness to the Government as of February 1, 1899, amounted to $58,812,715.48. This was to be covered by twenty notes of the Railroad Company, falling due one every six months, beginning August 1, 1899, and ending February 1, 1909. The notes were to carry interest at 3% per annum, payable semi-annually, and each note was to be secured by First Refunding 4% Gold Bonds of the above issue equal in amount to the face of the note. Speyer & Co. agreed with the Government to purchase the four notes earliest in point of maturity and to pay the face thereof as soon as received by the Government, leaving in the hands of the Government notes aggregating $47,050,172.36, to secure which the Government had in hand the 4% bonds to the amount of $47,056,000.

Thus was the debt of the Government arranged and settled in 1899, leaving, of course, the payment of the notes to come about as and when they matured, of which we shall speak later.

We come now to the settlement with the bondholders of the Central Pacific.

Settlement With Bondholders of Central Pacific.

As already stated, the outstanding bond issue of the Central Pacific, composed of seven issues, aggregated $57,471,000. It

was a part of the plan that Speyer & Co. should purchase these bonds for cash if the bondholders desired cash in exchange therefor—four of the issues at par, two of the issues at 105, and one at 109, as follows (Answer, I R. 61, 62):

$25,881,000	Central Pacific Railroad Company, of California, First Mortgage Bonds, Series A, B, C, D, E, F, G, H and I.....	At the price of par and accrued interest in New York.
2,735,000	Western Pacific Railroad Company First Mortgage Bonds, Series A and B.....	
6,080,000	Central Pacific Railroad Company (San Joaquin Valley Branch) First Mortgage Bonds.....	
2,134,000	Central Pacific Railroad Company Land Bonds..	
56,000	Central Pacific Railroad Company Fifty-Year Six Per Cent. Bonds...	At the price of 105 and accrued interest in New York.
10,245,000	Central Pacific Railroad Company Fifty-Year Five Per Cent. Bonds..	
10,340,000	California and Oregon Railroad Company and Central Pacific Railroad Company, successor, First Mortgage Bonds, Series A and B.	At the price of 109 and accrued interest in New York.

It was provided, however, that if the bondholders desired to accept the new securities in lieu of the bonds of the Central

Pacific then held by them, they should have the privilege of so doing upon the following terms (Answer, I R. 69):

Amount of Cash and New Securities which Existing Bonds were Entitled to Receive on Readjustment.

Existing Bonds.	Cash.	Each $1,000 Receives New 4% First Refunding Mortgage Gold Bonds.	New 3½% Mortgage Gold Bonds.
Central Pacific Railroad Company of California First Mortgage Bonds, Series A	$33.33	$1,000	$50
Series B to I, inclusive	29.17	1,000	50
Western Pacific Railroad Company First Mortgage Bonds, Series A and B	35.00	1,000	50
Central Pacific Railroad Company (San Joaquin Valley Branch) First Mortgage Bonds	50.00	1,000	75
Central Pacific Railroad Company Land Bonds	41.67	500	700
Central Pacific Railroad Company Fifty-Year 6% Bonds	50.00	500	900
Central Pacific Railroad Company Fifty-Year 5% Bonds	41.67	500	800
California and Oregon Railroad Company and Central Pacific Railroad Company, successor, First Mortgage Bonds, Series A and B	29.17	1,000	200

The foregoing terms, applied to all the outstanding issues, would have resulted in the payment of cash and the issuance of new securities as follows:

Table showing Amount of Cash and New Securities which Deposited Securities were Entitled to receive on Completion of Readjustment.

	Cash.	New 4% First Refunding Mortgage Gold Bonds.	New 3½% Mortgage Gold Bonds.
C. P. R. R. Co. of Cal. 1st Mtge. Bonds,			
*Series A	$99,823.35	.....	.....
Series B to I.....	667,584.62	$25,881,000	$1,294,050
W. P. R. R. Co. 1st Mtge. Bonds, Series A and B.....	95,725	2,735,000	136,750
C. P. R. R. Co. (San Joaquin Valley Branch) 1st Mtge. Bonds	304,000	6,080,000	456,000
C. P. R. R. Co. Land Bonds	88,923.78	1,067,000	1,493,800
C. P. R. R. Co. 50-yr. 6% Bonds.....	2,800	28,000	50,400
C. P. R. R. Co. 50-yr. 5% Bonds.....	426,909.15	5,122,500	8,196,000
C. & O. R. R. Co. and C. P. R. R. Co., successor, 1st Mtge. Bonds, Series A and B.....	301,617.80	10,340,000	2,068,000
	$1,987,383.70	$51,253,500	$13,695,000

In other words, the bonds of the Central Pacific, aggregating $57,741,000, were to be taken up and paid for by

(*a*) Cash to the amount of..... $1,987,383.70
(*b*) New 4% Bonds to the amount of..... 51,253,500.00
(*c*) New 3½ Bonds to the amount of..... 13,695,000.00

TOTAL $66,935,883.70

If any bondholder wished cash, Speyer & Co. undertook to buy and pay for the bonds at par or better, as stated in the Answer, I R. 61-62. On the other hand, if a bondholder

* Series A amounted to $2,995,000 and Series B to I inclusive, amounted to $22,886,000, making Series A to I inclusive, $25,881,000.

wished to take part in cash and part in each of the two new issues, he could do so on the terms stated above (Answer, I R. 69). Of course, as to those bondholders who elected to take in cash, Speyer & Co. stepped into their shoes and were to accept in lieu of the bonds of the old company so purchased by them the amount of cash and new securities provided for as above (Answer, I R. 69).

Thus were the holders of bonds in the old company to be taken care of. The plan by which they were to be taken care of involved cash to the amount of $1,987,383.70, provided for as hereinafter shown.

The arrangements with (*a*) the Government; (*b*) the bondholders of the old company, and (*c*) the new company in respect of the sale of its preferred and common stock, involved the disposition of the three bond issues already mentioned and one stock issue, as follows:

The $100,000,000 C. P. Issue.

Retained by the United States Government as collateral to sixteen notes aggregating $47,050,172.36	$47,056,000
Set apart to be exchanged for outstanding bonds of the Central Pacific as per the above table.	51,253,500
Balance of issue to be purchased by Speyer syndicate to provide cash requirements of reorganization	1,690,500
TOTAL	$100,000,000

The $25,000,000 C. P. Issue.

Set apart to be exchanged for outstanding bonds of the Central Pacific as per the above table..	$13,695,000
Balance of issue to be purchased by Speyer syndicate to provide cash requirements of reorganization	11,305,000
TOTAL	$25,000,000

The $36,819,000 S. P. Issue.

The C. P. stock, aggregating $67,275,500, par value, was to be acquired by the same amount of Southern Pacific stock plus 25% in bonds of the issue being here dealt with. This 25% is	$16,819,000
$12,000,000 of the preferred stock of the new C. P. was to be purchased by an equal amount of the par value of the bonds of the issue here dealt with, thereby requiring	12,000,000
The balance of the $20,000,000 issue of preferred stock was to be purchased as and when corporate needs so required by an equal amount at par value of the issue being here dealt with	8,000,000
TOTAL	$36,819,000

We come now for a moment to the stock transaction.

The Stock Transaction.

The Southern Pacific was forthwith to acquire $12,000,000 and, as and when occasion required, the other $8,000,000 of preferred stock, paying therefor its 4% bonds, par for par	$20,000,000
The Southern Pacific was to acquire $67,275,500 common stock of the Central Pacific, paying therefor its own stock, par for par, aggregating	67,275,500
And, in addition thereto, was to pay 25% of the par of the common stock of the Central Pacific in its own 4% Gold Bonds, amounting, as already stated, to	16,819,000
TOTAL	$104,094,500

The Southern Pacific, therefore, to acquire the stock of the Central Pacific, was to issue ultimately $36,819,000 in bonds and $67,275,500 in stock.

Cash Requirements.

We have already shown that the syndicate was to purchase bonds of the $100,000,000 issue to the amount of	$1,690,500
And of the $25,000,000 issue to the amount of	11,305,000
Making a total of bonds at par	$12,995,500

The purchase of these bonds, however, would not yield sufficient cash to take care of the requirements of the reorganization because the sum estimated as needed for that purpose was $21,420,100 made up of (*a*) $11,762,543.12 to be paid by Speyer & Co. to the Government for the four notes of earliest maturity, and (*b*) $9,657,556.88 for new equipment, improvements and other purposes of the new Company, including expenses, commissions, compensation, etc., incident to the reorganization of the company, making, as already stated, a total of $21,420,100 (Answer, I R. 70).

The cash requirements, therefore, of $21,420,100 could have been met by (*a*) $1,690,500 of the $100,000,000 issue; (*b*) $11,305,000 of the $25,000,000 issue; (*c*) $12,000,000 of the $36,819,000 issue, which $12,000,000 would be in the treasury of the Central Pacific Railway Company; and (*d*) such additional sum in bonds of the latter issue which would be found in the treasury of the Central Pacific Railway Company in exchange for preferred stock addition to the $12,000,000.

We may now sum the matter up by showing what the Southern Pacific Company did in this transaction.

What the Southern Pacific did.

(*a*) It became guarantor in respect of a bond issue of	$100,000,000
(*b*) It became guarantor in respect of a bond issue of	25,000,000
(*c*) It issued its own bonds for the purchase of $12,000,000 of the preferred stock of the new company, in the amount of	12,000,000
(*d*) It agreed as and when required to purchase the remaining $8,000,000 of the preferred stock of the new company with bonds in the amount of	8,000,000
(*e*) It agreed to issue its bonds as a part payment on the purchase price of $67,275,500 of the common stock of the new company, in the amount of	16,819,000
(*f*) It issued its own stock in partial payment of $67,275,500 of the common stock of the new company, in the amount of	67,275,500
Making a total of	$229,094,500

In other words, in the transaction the Southern Pacific Company (*a*) guaranteed $125,000,000 bonds of the new company; (*b*) issued, or agreed to issue, its own bonds to the amount of $36,819,000, and (*c*) issued its own stock to the amount of $67,275,500. *It did all of this in a plan whereby the reorganized Central Pacific Railway Company could pay its debt to the Government. Without the intervention of the Southern Pacific Company and the purchase by it of the stock of the Central Pacific and the guaranty of its bonds, it would have been impossible to make the arrangements which were made with the syndicate, and impossible to market the bonds of the Central Pacific Railway Company.*

In every real and substantial sense, therefore, the Government of the United States agreed with the Southern Pacific Company that it might acquire the Central Pacific Railway Company's stock in consideration of the guaranty by the Southern Pacific of the bonds of the Central Pacific Railway Company, the marketing of which provided the funds whereby the Government was paid, as we shall show.

(15) THE PART WHICH THE SOUTHERN PACIFIC WAS OBLIGED TO AND DID TAKE IN THE READJUSTMENT OF THE CENTRAL PACIFIC RAILROAD COMPANY'S AFFAIRS, INCLUDING THE SUBORDINATION OF ITS 99-YEAR LEASE, WITHOUT WHICH THE REORGANZATON COULD NOT HAVE BEEN ACCOMPLISHED.

In dealing with the settlement with the Government we have had occasion to review the financial obligations assumed by the Southern Pacific. We have not, however, spoken of the subordination of its lease to the securities which the new Central Pacific was to issue. This we proceed to do and we shall show, in addition, why it was that the Southern Pacific was obliged to assume the obligations which it did assume in the readjustment of the Central Pacific affairs.

The first requirement of the agreement with the Govern-

ment concerned the lease of 99 years from the Central Pacific to the Southern Pacific, of February 17, 1885, and its modifications. The agreement required that the indebtedness to the Government should be secured by the refunding bonds provided for in the readjustment plan, to the par value of the unpaid notes, and the agreement in terms required (Answer, (I R. 56) that the "mortgage securing such Refunding Bonds shall be prior in lien to any lease of the railroads of said Central Pacific Railroad Company or their appurtenances or any portion thereof."

The President and the members of his Cabinet, by whom this agreement was executed, were, as we have already shown, fully aware of the lease of the Central Pacific properties to the Southern Pacific Company. It is, therefore, clear that they here required the Southern Pacific Company to agree to subordinate its lease to the lien by which the refunding bonds were secured. In conformity with this requirement of the settlement, the Southern Pacific executed this agreement whereby it subordinated its lease to the mortgage by which the refunding bonds were secured. (See Defendants' Exhibit 48, the indenture of August 1, 1899, whereby the Southern Pacific subordinated its lease to the lien of the Central Pacific Railway Company's first refunding mortgage.)

Secondly, the Southern Pacific was required to guarantee the first refunding mortgage because the Government notes were to be secured by the first refunding mortgage contemplated by Speyer & Company's readjustment plan, and this plan required the guaranty of the Southern Pacific with a view to making a market for the bonds.

Attorney-General Griggs said (III R. 996):

> "the agreement that we made provided that the bonds deposited as security should be such bonds as were described in the plan of readjustment or settlement put out by Speyer & Company, and that plan described those bonds as guaranteed by the Southern Pacific Railroad, as I recollect."

Attorney-General Griggs also testified (III R. 999):

> "My recollection is that the guaranty of the Southern Pacific on those bonds was one of the agreed parts

of the negotiation, the government relying upon that as an additional security or guaranty to see that their debt would be paid, either by the new corporation that was to be formed and to issue these bonds, or by the guarantor, the Southern Pacific Company.

Q. If your recollection were not at fault in that respect, how its it possible that you should have passed, as the final agreement, one which did not, by reference or otherwise, call for any such guaranty, but merely called for first mortgage bonds?

A. I do not think we did. The agreement, as I recall, of February 1, 1899, provided that we were to receive as collateral security such bonds as were described in the Speyer prospectus and in that prospectus, as I understand the agreement, whatever it was, the Southern Pacific had agreed to guarantee those refunding fours."

Thereupon counsel for the Government interrogated Attorney-General Griggs with a view to establishing that the agreement with the Government did not require that the bonds should be guaranteed by the Southern Pacific, whereupon Attorney-General Griggs in answering these questions said (III R. 1000-1002):

"My understanding of that was, Speyer & Company being a party to this agreement, the deposit of the various underlying bonds and stocks and so forth being recited, the agreement of reorganization or scheme or prospectus being in our possession, showing that these bonds were to be guaranteed by the Southern Pacific, those were the bonds that we meant when we described the four per cent. refunding bonds.

I should say our assumption was that the description there related to the bonds that were described in that agreement, and it was all part of the one scheme, which we knew at the time, from negotiations with Mr. Huntington and from familiarity with that document, were actually being put through by the efforts and on the responsibility of the Southern Pacific.

. . . . . .

Speaking of the matter as it appears in the contract, I am not prepared to argue whether we would have been entitled to reject bonds that were offered as security without the guaranty of the Southern Pacific; but, as a matter of fact, that was in the contemplation of the

parties when the agreement was signed, I should say that nothing short of that would be acceptable.

. . . . . .

That might be argued from the face of the papers, but as against that I have the very clear recollection that the bonds were to be guaranteed by the Southern Pacific, and that we thought the agreement was efficient to secure that. Whether it would have turned out, on a law suit, to be efficient or not is another matter; but that we thought it was efficient, there is no doubt.

. . . . . .

If your question is intended to ask me whether I infer that the guaranty of the Southern Pacific might have been taken out of the arrangement, I should say decidedly not. My recollection is that that was an essential part of the agreement. The arrangement was put through, it was enabled to be put through by reason of the intervention of Mr. Huntington for the Southern Pacific Company. We all recognized that at the time, and we all understood that we were getting the endorsement of his company on these bonds.

Now, whether we put it in the agreement or not may be a matter of difference of legal opinion just now; but that we were to have it, and that we did get it, is a matter of positive recollection on my part."

Mr. Speyer testified to the same effect (III R. 1182-1183, 1184-85):

"Q. Mr. Speyer, when you started to work upon that plan of readjustment did you expect and count upon the intervention and aid of the Southern Pacific Company?

A. I knew I could not carry it through without the help of the Southern Pacific; or some other railroad company, in case the Southern Pacific had not come to assist.

Q. Did you ever contemplate or work upon any plan which did not involve the intervention and aid of the Southern Pacific Company?

A. I did not.

. . . . . .

Q. Mr. Speyer, considering the terms required by the act of Congress, namely, the requirement that the entire debt of fifty-eight million eight hundred thousand dollars, in round numbers, would have to be paid in ten years, in twenty semi-annual installments, would

any one at all familiar with the Central Pacific affairs know that the Central Pacific, with its own resources and credit, could not comply with these conditions?

A. He would.

A. Yes, sir.

Q. It would be obvious to any one at all familiar with the affairs of the Central Pacific that it could not, with its own resources and credit, comply with the terms of that act?

A. Yes, sir.

Q. In making the agreement which you participated in with the United States, what did you count upon to enable you to carry out the agreement with the United States?

A. The co-operation of the security holders of the Central Pacific and of the Southern Pacific Company.

Q. As outlined in your plan of readjustment?

A. Yes.

Q. Had you formulated your plan of readjustment before you executed the agreement with the United States?

A. Yes, sir.

Q. Would you have signed that agreement if you had not had your plan of readjustment formulated?

A. No, sir.

Q. Would you have signed the agreement if you had not been reasonably assured of the operation of the plan?

A. No; I would not.

. . . . . .

Q. What effect upon the value of the bonds as security did the Southern Pacific guaranty have?

A. It increased their value.

Q. Greatly?

A. I should say so.

Q. How did the resources and credit of the Southern Pacific Company compare with those of the Central Pacific?

A. They were superior to those of the Central Pacific.

Q. Was the superiority very great?

A. I suppose the quotations of those days, which I have not before me—the quotations of the bonds and stocks, which I do not remember, would show how great the difference was, in public opinion.

Q. What is your recollection about it?

A. That it was very considerable."

Again (III R. 1205-1206):

> "Q. Did either Mr. Griggs, Mr. Bliss, Mr. Gage, Mr. Root or President McKinley receive a copy of this reorganization plan that was promulgated by your circular of February 20, 1899?
>
> A. I have no doubt they did.
>
> . . . . . .
>
> These whole negotiations were carried on absolutely on the table. Everything that was done was known to everybody interested, and I am perfectly satisfied that they had this plan and the provisos of it, and knew exactly what we were doing all the time. I am satisfied that they knew about the Southern Pacific guaranty, and thought it a valuable thing. I could not tell you when I gave them this plan, or how many copies they got, or who got it. I cannot remember. I do remember, however, distinctly, that everything we did, and everything I did was done just in that way; that they got everything; they knew everything we were doing; because I remember that President McKinley particularly thanked me, when it was all over—I do not want to repeat his words, but he was very flattering about the way I had conducted this negotiation. He knew everything I was doing, and he showed me the greatest confidence, and let me do it in my own way.
>
> . . . . . .
>
> Q. Did you ever suggest to any of these five gentlemen their taking these bonds, or any bonds, without a guaranty?
>
> A. Never."

Mr. Speyer also testified that the Government understood that the bonds were to be guaranteed (III R. 1185), and that if the Central Pacific bonds offered to the Government did not carry the guaranty of the Southern Pacific Company, those bonds would not have been in accordance with the understanding (III R. 1185-6).

During Mr. Speyer's examination, counsel for the Government suggested that the Union Pacific might have underwritten the refunding obligations of the Central Pacific, but Mr. Speyer testified (III R. 1200):

> "The Union Pacific was just emerging from reorganization itself. Nobody could tell how it was to work out,

and it was our judgment that we could get more assistance from the Southern Pacific Company in settling that debt, than from anybody else. . . . I was thinking: where could we get the best financial backing; and the Southern Pacific backing at that time would be a great deal more valuable than that of the Union Pacific. I do not want to compare Mr. Huntington and Mr. Harriman at all; but the Union Pacific was just then emerging from the receivership."

Secretary of the Treasury Gage testified (III R. 1011-1012):

"Q. What securties were actually taken in executing the agreement?

A. They were part of an issue of one hundred millions of dollars of bonds by the reorganized Central Pacific Railroad, running during a certain time in the future —I forget the time—guaranteed by the Southern Pacific Company.

. . . . . .

The securities, as delivered; that is to say, the bonds that served as collateral to the series of notes given in settlement of the claims of the government, were in conformity to what I understood was to be the nature of the security.

Q. It was your duty, as Secretary of the Treasury, to receive and hold those notes and the collateral security?

A. That was my main duty and the main thought I had in mind.

Q. Would you have accepted the bonds without the guaranty of the Southern Pacific Railroad Company?

. . . . . .

The Witness: I am unable to answer that yes or no, because that proposition never came before me.

Q. But you do say that the bonds, with the guaranty endorsed, were in accordance with your understanding?

. . . . . .

The Witness: Yes, that is correct."

We have thus far dealt with the necessity for the participation of the Southern Pacific in the reorganization of the Central Pacific insofar (*a*) as it was required to subordinate its lease to the lien of the new bond issue; and (*b*) as it was required to guarantee the issue of refunding bonds, part of which were to go into the hands of the Government.

In two further particulars, the Southern Pacific Company was required to assume the burden of the readjustment plan, namely: (1) the guaranty of the $25,000,000 issue of 3½% bonds of the Central Pacific; and (2) the purchase of the preferred and common stock of the new Central Pacific Railway Company. It was necessary for the Southern Pacific to guarantee the 3½% issue in order that that issue might be taken by the old security holders, or if not taken by the old security holders, in order that those bonds might be sold on the market to provide funds to take up the bonds held by the old security holders. In other words, the guaranty by the Southern Pacific of the 3½% issue was necessary to move Speyer & Company to the general readjustment.

This leaves for consideration the fourth particular in which it was necessary for the Southern Pacific to participate. The plan provided that the new Central Pacific Railway Company should have $20,000,000 in preferred shares and that these preferred shares, as and when sold, should be taken by the Southern Pacific at par, payable in the bonds of its issue of $36,819,000 put out in 1899. These bonds would find their way into the treasury of the Central Pacific Railway Company and be available for the corporate purposes of the new Central Pacific Railway Company, thereby put in possession of new funds. This left the stockholders of the old Central Pacific to be dealt with, and their stock had to be taken over if a reorganization were to be accomplished in accordance with the requirements of the situation. The outstanding shares of the old Central Pacific were taken in by the Southern Pacific, share for share, at par, plus 25% in bonds of the $36,819,000 issue. In other words, of this issue of $36,819,000, $20,000,000 was to be used for the issue of the preferred stock of the Central Pacific, and the remaining $16,819,000 was just more than sufficient to provide 25% of the $67,275,500 in stock of the old Central Pacific outstanding in the hands of private proprietors.

It is, therefore, readily apparent that the Southern Pacific assumed the burden of the plan for the readjustment of the Central Pacific and the settlement of the Government debt.

(16) THE APPROVAL BY CONGRESS OF THE SETTLEMENT OF FEBRUARY 1, 1899, BY THE PASSAGE OF THE ACT OF MARCH 3, 1899 (30 STAT. 1245), CONFERRING AUTHORITY UPON THE SECRETARY OF THE TREASURY TO CARRY THE SETTLEMENT INTO EFFECT.

It will be recalled that the settlement agreement bears date February 1, 1899. In point of fact, it was executed in Washington February 15, 1899, by President McKinley, Secretary Bliss and Attorney-General Griggs; and by Secretary Gage at Boston February 16, 1899. *A copy of the agreement was laid before both houses of Congress February 20, 1899, and referred by each of them to its Committee on Pacific Railroads.*

The report to the House, with which the Senate report was identical, reads as follows (H. R. Document No. 238, 55th Congress, Third Session):

INDEBTEDNESS OF CENTRAL PACIFIC AND WESTERN PACIFIC RAILROADS.

Report of the Commissioners appointed to settle the Indebtedness to the Government growing out of the issue of bonds in aid of the Construction of the Central Pacific and Western Pacific Railroads.

February 20, 1899—Referred to the Committee on Pacific Railroads and ordered to be printed.

WASHINGTON, D. C., February 15, 1899.

TO THE HOUSE OF REPRESENTATIVES:

The undersigned commissioners, appointed by the deficiency appropriation act approved July 7, 1898, to settle the indebtedness to the Government growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific railroads, would respectfully report that they have concluded a settlement of the said indebtedness with the Central Pacific Railroad Company, the owner of the said railroads. A

copy of the agreement of settlement is herewith transmitted.

The settlement is made as of the 1st day of February, 1899, at which date the amount due to the United States for principal and interest upon its subsidy liens upon the Central Pacific and Western Pacific railroads amounted to the sum of $58,812,715.48 that being the full amount necessary to reimburse the United States for the moneys paid for interest or otherwise in aid of the construction of said railroads.

Said indebtedness is, by the agreement of settlement, funded at the amount aforesaid into twenty promissory notes, dated February 1, 1899, payable, respectively, on or before the expiration of each successive six months for ten years, each note being for the sum of $2,940,635.78, which is one-twentieth of the total amount due. Said notes bear interest at the rate of 3 per cent. per annum, payable semiannually, and have a condition attached thereto to the effect that if default be made in any payment of either principal or interest of any of said notes, or any part thereof, then all of said notes then outstanding, principal and interest, shall immediately become due and payable, notwithstanding any other stipulation of the agreement of settlement.

It is further provided that the payment of the principal and interest of said notes shall be secured by $58,820,000 of face value first refunding mortgage 4 per cent gold bonds to be hereafter issued by the Central Pacific Railroad Company, or its successor having title to the railroads now owned by said company and specified in said agreement, such bonds to be part of an issue of not exceeding $100,000,000 in all.

Said bonds are to be secured by a mortgage upon all railroads, equipment, and terminals now owned by said Central Pacific Railroad Company, which mortgage shall be the first lien upon such property, or shall be secured by the deposit as collateral security therefor of certain percentages of the now outstanding bonds upon said property, or the different divisional parts thereof. The form of such mortgage is subject to the agreement of the parties to said agreement of settlement, and has been approved by the Attorney-General.

The agreement further provides that Speyer & Co., who are a party thereto, shall, within one month after the delivery to the United States of the settlement notes, accept from the Secretary of the Treasury the four ear-

liest maturing notes, and pay to the United States the face value thereof, with accrued interest thereon to the date of payment, without recourse further than that Speyer & Co. shall, until the delivery of the refunding bonds as collateral, be entitled to share *pro rata* with the United States in the lien and all proceeds of the lien in favor of the United States to secure said indebtedness.

The said agreement was submitted in writing to the President and approved by him on the 15th day of February, and the said promissory notes, have been duly delivered to the Treasurer of the United States.

Other provisions and particulars of said agreement will appear by a perusal thereof, to which reference is respectfuly made.

The execution of the agreement was duly authorized by resolution of the board of directors of the Central Pacific Railroad Company, and approved by the formal action and consent of a large majority of the stockholders.

The commissioners have not found it necessary to expend any part of the sum of $20,000 appropriated for the expenses of the commission.

LYMAN J. GAGE,
Secretary of the Treasury.
CORNELIUS N. BLISS,
Secretary of the Interior.
JOHN W. GRIGGS,
Attorney-General.

A copy of the agreement was appended.

Speyer's plan for the readjustment of the affairs of the Central Pacific bore date February 8, 1899, and was put out in a circular of date February 20, 1899, addressed to bankers, financiers and others, in Europe and America. Thus the entire plan for the reorganization of the Central Pacific became a public document as early as February 20, 1899. In addition, the *Commercial & Financial Chronicle* for February 18th and February 25th, 1899, contained all of the particulars of the readjustment plans of Speyer & Company.

It is also to be noted that although the plan of readjust-

ment, which is Exhibit "B" to the Answer here, was dated February 8, 1899, Mr. Speyer testified (III R. 1187):

> "There were no doubt numerous proofs before that, but this was the first complete, final print.
>
> . . . . . .
>
> There were probably twenty or thirty proofs or revises."

It will also be remembered that the Agreement of February 1, 1899, contained the following clauses:

> "Within thirty days after this settlement shall become binding, by the submission thereof in writing to the President, and his approval thereof, the Central Pacific Railroad Company shall deliver to the Treasurer of the United States its twenty promissory notes, bearing even date herewith, payable respectively on or before the expiration of each successive six months for ten years, counting from the date of this agreement, each note being for one-twentieth of the foregoing sum of $58,812,715.48, and bearing interest at the rate of three per cent. per anum, payable semi-annually.
>
> Messrs. Speyer and Company, within one month after the delivery to the United States of the notes referred to in Article Second hereof, will, against delivery to them of the four earliest maturing notes, endorsed to their order by the Secretary of the Treasury on behalf of the United States without recourse to it, pay to the United States the face value of such notes, viz.: Eleven million seven hundred and sixty-two thousand five hundred and forty-three dollars and twelve cents ($11,762,543.12), with accrued interest thereon to date of payment."

With full knowledge of all of the facts before it, and in order that the authority of the Secretary of the Treasury to sell these notes to Speyer & Company, in accordance with the above agreement, might be confirmed, Congress passed the Act of March 3, 1899 (30 Stat. 1245), as follows:

> "And authority is hereby granted to the Secretary of the Treasury, in his discretion, to dispose of, without commission, at not less than par and accrued interest, any notes or other evidence in his possession touching the indebtedness of the Central Pacific Railroad Company to the United States."

(17) THE PAYMENT OF $11,798,314.14 TO THE GOVERNMENT BY SPEYER & COMPANY MARCH 27, 1899, AS A PART OF THE CENTRAL PACIFIC SETTLEMENT.

In the report of the Commission on the settlement of the Central Pacific debt, filed with both houses of Congress February 20, 1899 (both dated February 15, 1899), it is recited that "the said promissory notes have been duly delivered to the Treasurer of the United States", so that as early as February 20, 1899, these notes were in the hands of the Government.

What next took place is told in the Attorney General's Report 1899 (D. Ex. 53), page 31:

> "The notes provided for by this agreement were duly executed and delivered to the Treasurer of the United States in conformity with the terms of the agreement. In pursuance of another provision of the agreement, the four earliest maturing notes were purchased by Speyer & Co., March 10, 1899, and the proceeds, amounting to $11,762, 543.12, and accrued interest to the date of payment $35,771.02, in all $11,798,314.14, were received and covered into the Treasury March 27, 1899, as part payment of the indebtedness of the Central Pacific and Western Pacific Railroad companies."

(18) THE INCORPORATION OF THE CENTRAL PACIFIC RAILWAY COMPANY IN AUGUST, 1899, THE TRANSFER TO THAT COMPANY OF THE ASSETS OF THE OLD COMPANY, THE ISSUANCE AND PUTTING OUT OF THE SECURITIES OF THE NEW COMPANY, THE PURCHASE FROM THE NEW COMPANY OF ITS PREFERRED STOCK BY THE SOUTHERN PACIFIC COMPANY, AND THE PURCHASE BY THE SOUTHERN PACIFIC COMPANY OF THE STOCK OF THE OLD COMPANY FROM THE HOLDERS THEREOF.

Central Pacific Railway Company, a Utah corporation, was organized under articles dated July 26, 1899, which were filed July 29, 1899 (D. Ex. 46, V R. 1967).

On July 29, 1899, the Central Pacific Railroad Company (incorporated in California June 28, 1861) executed a deed to the Central Pacific Railway Company (incorporated in Utah July 29, 1899) conveying all of its property (D. Ex. 47, V R. 1978).

Among the provisions of said deed is the following (D. Ex. 47, V R. 1982-1983):

> "And in further consideration hereof, and in order to provide for the readjustment of the present funded indebtedness of the party of the first part (subject to which the properties of said party of the first part are hereby conveyed), and for the purpose of securing the payment of the amounts becoming due on the Notes given by said party of the first part to the United States under said Settlement Agreement, dated February 1, 1899, as in said Settlement Agreement prescribed, the party of the second part has assumed and hereby assumes the payment of all the indebtedness and guaranties of the said party of the first part, and has undertaken, covenanted and agreed, and hereby undertakes, covenants and agrees, to and with the party of the first part, that it will issue stocks and securities and execute mortgages as prescribed in the Central Pacific Readjustment Plan and Agreement, dated February 8, 1899, issued by Speyer & Co., Speyer Brothers, Laz Speyer Ellissen, Teixeira de Mattos Brothers and the Deutsche Bank of Berlin, as Readjustment Managers, or as the same may be modified under the terms thereof and with the assent of the party of the second part, and in a certain Agree ment bearing date the 20th day of February, one thousand eight hundred and ninety-nine, by and between F. G. Banbury, Esq., M. P., John B. Akroyd, Esq., Lord Alwyne Compton, M. P., Daniel Marks, Esq., and Joseph Price, Esq., as the London Committee of Central Pacific Shareholders, Messrs. Speyer & Company of New York, Messrs. Speyer Brothers of London, Mr. Laz Speyer Ellissen of Frankfort-on-the-Main, Messrs. Teixeira de Mattos Brothers of Amsterdam, and the Deutsche Bank of Berlin, as Readjustment Managers as therein stated, and the Southern Pacific Company, and in a certain other Agreement bearing date the 1st day of March, one thousand eight hundred and ninety-nine, by and between August Belmont, Esq., Hon. John G. Carlisle and George Coppell, Esq., as the Aemircan Committee of Central Pacific Shareholders, the said Readjustment

> Managers and the Southern Pacific Company, and, under arrangements made or to be made with said Readjustment Managers will carry out such Readjustment Plan and said Agreements."

August 1, 1899, the Central Pacific Railway Company executed (*a*) its first refunding 4% mortgage, securing an issue of $100,000,000 to the Central Trust Company of New York, as trustee; and (*b*) its 3½% mortgage, securing an issue of $25,000,000 to the United States Trust Company of New York, as trustee (D. Ex. 27, V R. 1788; 28, V R. 1829).

August 1, 1899, the Southern Pacific Company executed (*a*) to Central Trust Company of New York an indenture subordinating its lease of the Central Pacific lines to the $100,000,000 mortgage, and (*b*) to United States Trust Company of New York an indenture subordinating its lease of the Central Pacific lines to the lien of the $25,000,000 issue (D. Ex. 48, V R. 1983; 49, V R. 1987).

Henry Ruhlander, of the firm of Speyer & Company, testified that the plan of readjustment, which is Exhibit "B" to the Answer, was actually carried out in accordance with its terms, resulting in the organization of the Central Pacific Railway Company and the issuance of its 4% refunding bonds and its 3½% mortgage bonds, and the acquisition of the common stock of the old Central Pacific Railroad Company by the Southern Pacific in exchange for its stock and 25% in bonds; and that the other conditions of the plan were carried out (III R. 924).

In the Attorney General's Report 1899, it is said (p. 31):

> "On October 7, 1899, bonds were delivered to the Treasury Department by the (Central) Pacific Railway Company to secure the outstanding notes held by the Treasury in conformity to the terms of the agreement of settlement."

(19) THE ACT OF MARCH 3, 1901 (31 STAT. 1023), AS A FURTHER RECOGNITION AND CONFIRMATION OF THE READJUSTMENT PLAN.

We have just seen that after becoming possessed of all of the facts relating to the matter, Congress passed a law authorizing the Secretary of the Treasury to carry out the terms of the agreement of February 1, 1899.

We now mention a second act of similar import, passed March 3, 1901. Before doing so, however, we desire again to call attention to the report of Attorney-General Griggs for 1899, pages 30 to 33 (D. Ex. 53).

"Pacific Railroad Matters.

The deficiency appropriation act of July 7, 1898, appointed the Secretary of the Treasury, the Secretary of the Interior, and the Attorney-General a commission with full power to settle the indebtedness to the Government growing out of the issue of bonds to aid in the construction of the Central Pacific and Western Pacific bond-aided railroads upon such terms and in such manner as might be agreed upon by them or by a majority of them and the owners of said railroads, subject to the approval of the President.

An agreement for the settlement of this indebtedness was entered into between the said commissioners with the railroad companies on February 1, 1899. At that date the amount due the United States for principal and interest upon its subsidy liens upon the Central Pacific and the Western Pacific railroads was $58,812,715.48, more than one-half of which was accrued interest upon the principal debt. The agreement of settlement provided for the funding of this amount into 20 promissory notes bearing date February 1, 1899, payable, respectively, on or before the expiration of each successive six months for ten years, each note being for the sum of $2,940,635.78, or one-twentieth of the total amount due. The notes bear interest at the rate of 3 per cent. per annum, payable semi-annually, and have a condition attached to the effect that if default be made either in the payment of principal or interest or either of said

notes or in any part thereof, then all of the said notes outstanding, principal and interest, shall immediately become due and payable notwithstanding any other stipulation of the agreement of settlement.

It was further agreed that the payment of the principal and interest of the notes shall be secured by the deposit with the United States Treasury of $58,820,000 of face value of first refunding mortgage 4 per cent. gold bonds, to be thereafter issued by the Central Pacific or its successor having charge of the railroads then owned by said company, such bonds to be part of an issue of not exceeding $100,000,000 in all, and to be secured by mortgage upon all railroads, equipments, and terminals owned by said Central Pacific Railroad Company, such mortgage to be a first lien upon such property, or to be secured by the deposit as collateral of certain percentages of the outstanding bonds upon such property or on the different divisional parts thereof.

The notes provided for by this agreement were duly executed and delivered to the Treasurer of the United States in conformity with the terms of the agreement. In pursuance of another provision of the agreement, the four earliest maturing notes were purchased by Speyer & Co., March 10, 1899, and the proceeds, amounting to $11,762,543.12, and accrued interest to the date of payment $35,771.02, in all $11,798,314.14, were received and covered into the Treasury March 27, 1899, as part payment of the indebtedness of the Central Pacific and Western Pacific Railroad Companies. The properties of the various companies comprising the Central Pacific system were subsequently conveyed to a new corporation called the Central Pacific Railway Company, which latter company executed the mortgage and bonds provided for by the agreement of settlement. On October 7, 1899, bonds were delivered to the Treasury Department by the Central Pacific Railway Company, to secure the outstanding notes held by the Treasury in conformity to the terms of the agreement of settlement. The United States therefore holds the notes of the Central Pacific Railroad Company guaranteed* by the Southern Pacific Railroad Com-

* The notes themselves were not guaranteed but the entire issue of bonds was guaranteed and there were in the hands of the Government bonds equal in amount to the face of the notes and bearing, of course, the guaranty of the Southern Pacific Company.

> pany to the amount of $47,050,172.36, bearing interest payable semi-annually at the rate of 3 per cent. per annum and secured by the deposit of an equal amount of first-mortgage bonds of the Pacific Railway Company, thus providing, beyond doubt or peradventure, for the sure and gradual payment of the whole of this subsidy debt, and providing in the meantime for the payment of interest at the rate of 3 per cent. upon the unpaid balances.
>
> . . . . . .
>
> Taking into account the enormous material benefits that have accrued to the country from the construction of these transcontinental lines of communication, and the advantage which the Government has had by way of reduced rates of transportation and service over them, the participation of the Government in the construction and maintenance of these enterprises has been fully justified, and the faith of the original promoters and projectors of these great lines has been proven to have had a substantial basis."

It is clear, therefore, that all the details of the settlement between the Central Pacific and the Government had become matters of common and universal knowledge in the country, and cumulative evidence to this point may be found in the frequent reviews of the readjustment, with all its incidents, published in the *Commercial and Financial Chronicle* throughout the year 1899 (D. Ex. 95).

In 1900 questions relating to interest upon allowed claims for transportation service rendered the Government over the non-bond-aided lines of the Central Pacific Railroad Company and Southern Pacific Company were before the Senate Committee on Appropriations. In response to a request from the Committee the details of these claims were laid before the Committee by Secretary of the Treasury Gage in a letter dated May 12, 1900, which is Exhibit "C" to the Answer (I R. 73). This letter was ordered to be printed by the Senate March 2, 1901, and on the following day the Act of March 3, 1901 (31 Stat. 1023) became a law. This law reads as follows:

> "That the Secretary of the Treasury is hereby authorized and directed to make settlement of the claims grow-

ing out of Government transportation over non-bond-aided lines of the Southern Pacific Company and Central Pacific Railroad Company by crediting against the notes of the Central Pacific Railroad Company held in the Treasury of the United States interest on all of said judgment and allowed claims at four per centum per annum, as set forth in his letter to the chairman of the Committee on Appropriations of the Senate, dated May twelfth, nineteen hundred."

In other words, Congress thereby authorized and ratified, for the second time, the carrying into effect by the Secretary of the Treasury of the plan of readjustment of February 1, 1899.

(20) THE PAYMENT TO THE GOVERNMENT OF THE $47,050,172.48, WITH INTEREST, IN DISCHARGE OF THE SIXTEEN NOTES REMAINING IN THE HANDS OF THE GOVERNMENT AFTER SPEYER & COMPANY HAD TAKEN OVER THE FOUR NOTES EARLIEST IN POINT OF MATURITY.

It appears by the testimony of Andrew K. Van Deventer, Treasurer of the Southern Pacific Company, that all the notes held by the Government were payable as and when they matured, except the four earliest ones, the maturity of which was anticipated. The last of these notes matured February 1, 1909. We may presume that the last payment was made upon that date.

It is established by the testimony of Mr. Van Deventer that these payments were made by the Southern Pacific Company (III R. 904). It appears too, that these notes were charged by the Southern Pacific to the Central Pacific, and by the Central Pacific paid. Inasmuch, however, as the Southern Pacific was the only stockholder of the Central Pacific, it is a mere matter of bookkeeping by whom they were paid. The point, after all, is, who made the payment possible. We think that we have clearly shown that it was the Southern Pacific that did this.

(21) THE CASE OF UNITED STATES v. UNION PACIFIC R. CO., 226 U. S. 61, FROM ITS COMMENCEMENT FEBRUARY 1, 1908, TO THE ENTRY OF THE FINAL DECREE JUNE 30, 1913.

As we shall have occasion later to deal with this case, we refer here only to that phase of the case which concerns the questions with which we have been dealing and are about to deal.

The suit was filed in the Circuit Court for the District of Utah February 1, 1908, the Southern Pacific Company being one of the defendants therein. It was there decided June 24, 1911 (188 Fed. 102). The decision of the Supreme Court was rendered December 2, 1912. Upon the going down of the mandate, the Government moved that the Southern Pacific Railroad Company and the Central Pacific Railway Company should be brought in as additional parties defendant, which was accordingly done February 12, 1913. The final decree was entered June 30, 1913.

The petition filed February 1, 1908, alleged (pp. 4-7):

> "That the Central Pacific Railroad Company was organized under the laws of California, and constructed a line of railroad from Sacramento, Cal., to Ogden, Utah;
>
> That the Western Pacific Railroad Company was organized also under the laws of California, and constructed a line of railroad from San Francisco to Sacramento, Cal., and that these two latter corporations were afterwards consolidated into and became the Central Pacific Railroad Company, which was for many years engaged in the operation of said line of railroad from San Francisco to Ogden, at which point it connected with the main line of said Union Pacific Railroad Company;
>
> . . . . . .
>
> That by the act of Congress approved July 2, 1864, the said lines of railway (the roads named in the Act of July 1, 1862) receiving said aid (land grants and Government bond aid) . . . were required to operate their lines as one continuous line, without discrim-

ination against or in favor of any or either of said companies;

That in and by section 15 of said act of Congress approved July 2, 1864, it was, among other things, provided 'That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line, and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others.'

That by the act of Congress approved June 20, 1874 (18 Stat. 111), this provision was in substance reenacted, and any officer or agent of the companies refusing to operate and use the said railroads for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line, without discrimination as aforesaid, was declared to be guilty of a disdemeanor, punishable by fine and imprisonment; and any party injured was authorized to sue for damages or to procure an injunction to enforce its provisions.

. . . . . .

That the Southern Pacific Company was on said January 1, 1901 (the year in which the alleged combination occurred), and still is the owner and in control by and through its ownership of the stock of various connecting lines of a line of railway extending from New Orleans, in the State of Louisiana, through said State and the State of Texas, the Territories of New Mexico and Arizona, and the States of California and Oregon, to said Portland;

That said Southern Pacific Company also owned and still owns a line connecting with said through lines ending at Galveston, Tex., upon the Gulf of Mexico, and in connection with its lines of railroad so reaching New Orleans and Galveston it owned and operated and still owns and operates a line of steamships running from said ports to Habana, Cuba, and to the city of New York;

That then and now the said Southern Pacific Company was and is also the owner of all the capital stock

of the Central Pacific Railroad Company,* a corporation organized and existing under the laws of California, which succeeded to the ownership of the line of railway from Ogden to San Francisco theretofore owned by the corporation of the same name, to wit, Central Pacific Railroad Company, hereinbefore particularly described; and by virtue of such ownership of all said capital stock said Southern Pacific Company then and now in all respects controls the operation and management of the affairs and business of said Central Pacific Railroad Company."*

. . . . . .

That the said rail lines of the said Southern Pacific Company from the Mississippi River to Portland, Oreg., by way of San Francisco and Los Angeles, were in active competition with said lines of railroad of the Union Pacific Railroad Company for the transportation of vast quantities of freight from points in the Mississippi Valley and in the Eastern States, both to and from the Pacific coast and points in Colorado and other interior States; and said steamship line of said Southern Pacific Company from New York to New Orleans and Galveston, together with its rail lines run in connection therewith, was in active competition with the lines of said Union Pacific Railroad Company for a large amount of traffic originating in the Atlantic coast and Central states;

That the rail line of said Southern Pacific Company from San Francisco to Portland was in active competition with the ships plying between San Francisco and Portland and owned by said Oregon Railroad & Navigation Company, as hereinbefore alleged;

That the said ships of the Portland and Asiatic Steamship Company, in connection with the rail lines of said Union Pacific Railroad Company and its subsidiary companies, as hereinbefore alleged, running from Portland, Oreg., to the East, were in active competition with the ships of said Pacific Mail Steamship Company and the rails of said Southern Pacific Company running to the East from San Francisco;

That the line of railroad composed of the tracks of said Oregon Short Line Railroad Company and said Oregon Railroad & Navigation Company betwen Ogden, Utah, and Portland, Oreg., were in active competition

* This description of the corporation was inaccurate because the new company was the Central Pacific *Railway* Company, a *Utah* corporation.

with the lines of said Southern Pacific Company between said points;

That the rail lines of the said Southern Pacific Company were in active competition with the ships and rail lines of the said Oregon Railroad & Navigation Company for a large amount of traffic between San Francisco and points in Montana, Idaho, and other States.

That the competition hereinbefore alleged between the system of railroads and steamships owned and controlled by said Union Pacific Railroad Company and the system of railroads and steamships owned and controlled by said Southern Pacific Company was substantial and included a large volume of traffic, both freight and passenger.

That the Atchison, Topeka & Santa Fe Railway Company has been for a period of more than eight years last past the owner and in control, by direct ownership and by the ownership of the stock of railway companies owning a portion of said lines and by lease, of a line of railway reaching from Chicago, in the State of Illinois, through the States of Illinois, Missouri, Kansas, Colorado, the Territories of New Mexico, Arizona, and the State of California to the city of San Francisco and to tide water at San Diego, Cal.; that said line of railway touches the Union Pacific at Kansas City, Mo., and is and during all said times has been competitive with said Union Pacific Railroad Company and said Southern Pacific Company for a large traffic to and from the Pacific coast and the Orient, to and from various points in the east and the Mississippi valley and in the State of Colorado and other interior States;"

In the taking of testimony the Government undertook to prove, with what success will hereafter appear, that prior to the Union Pacific's acquisition of control of the Southern Pacific, there was active and vigorous competition between the Ogden and El Paso routes.

In deciding the case, Judge Adams said (188 Fed. 102, 113):

"The voluminous evidence of officers, agents, and shippers to the effect that active competition existed between the Union Pacific and Southern Pacific roads prior to 1901 must be considered in the light of the legal and physical relations of the roads to each other and of other related facts. Whether there was competition or not, in

view of all these things, is a mixed question of law and fact, and not susceptible of determination by the preponderance of proof as an issue of fact only."

In his dissenting opinion, Judge Hook said (p. 121):

"The other question in the case is decided by the court against the government. It is whether the two great transportation systems, the Union Pacific and the Southern Pacific, were in a substantial sense competitors in interstate and foreign commerce. This question involves the relative location of their lines on land and sea, and not only the parts they actually performed, but also those they were naturally capable of performing, in the movement of traffic. Albeit in part within the domain of judicial knowledge, this seems to me to be a pure question of fact. Some hundreds of witnesses, practical railroad men and shippers of wide experience, testified upon it, and a great mass of evidence was taken, showing almost without dispute that, using the term 'competition' as business men understand and use it, there was active, vigorous, and substantial competition between the Union Pacific and the Southern Pacific before the former obtained control of the latter. But the court holds the question of competition to be one of mixed law and fact, not determinable by the evidence alone, and as such it is answered against the government."

Again, Judge Hook said, in reply to the argument that the competitive traffic was small when compared with the total traffic (p. 124):

"The magnitude of the traffic shown by the proofs was too great, and *the competition for it too earnest and active,* to dismiss it as merely incidental to the principal business of the companies, and as not furnishing a motive for the merger or combination."

In the Supreme Court it was said (226 U. S. 86-87):

"It is said, however, and this was the view of the majority of the circuit judges, that these railroads were not competing, but were engaged in a partnership in interstate carriage as connecting railroads; and it was further said that the Southern Pacific, because of its control of the line from Ogden to San Francisco and other California points, was the dominating partner. A large amount of the testimony in this voluminous record was

given by railroad men of wide experience, business men and shippers, who, with practical unanimity, expressed the view that, prior to the stock purchase in question, Union Pacific and Southern Pacific systems were in competition, sharp, well-defined, and vigorous, for interstate trade. To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific, through its agents, advertisements, and literature, had undertaken to obtain transportation for its 'Sunset' or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast."

Again (226 U. S. 89):

"The fact that the Southern Pacific had a road of its own from the Gulf to the Pacific coast did not prevent competition for this traffic. The Union Pacific and its connections were engaged in the same carrying trade, and as a mater of fact were competing for that trade by all the usual means of competition resorted to by rival railroad systems."

Again (226 U. S. 89-90):

"It is going too far to say that the Union Pacific was entirely at the mercy of the Southern Pacific in making rates for freight by way of the Ogden connection, because the latter company controlled the old Central Pacific line to San Francisco. It certainly would have been very detrimental to the Southern Pacific to have declined an arrangement for the carriage of freight received from the Union Pacific and its connections for transportation to California by way of the Ogden route. The traffic manager of the Southern Pacific testified that the division of the through rate from Omaha to San Francisco has been the same since 1870; that he thought it unfair to the Southern Pacific, but that it was the best that could be obtained at the time."

The keenness of this competition is described in the following extract from the Government's brief of facts in the Union Pacific Case (p. 39):

"There was the same incentive to active, energetic competition between these lines (Ogden and El Paso

routes) that there would have been had the Southern Pacific not owned the line between Ogden and San Francisco."

An adequate reason for the sharpness of this competition is stated in the opinion of the Railroad Commission of California in Decision No. 477 (Feb. 24, 1913), presently to be discussed in detail. The Commission says (p. 9):

> " . . . freight east and west through both the Ogden and El Paso gateways is at the present time carried in active competition with two other transcontinental lines, namely, the Atchison, Topeka and Santa Fe Railway Company and the Western Pacific Railway Company."

It is to be seen from the foregoing that the decision of the Supreme Court in the Union Pacific Case shows (*a*) that prior to the acquisition of control of the Southern Pacific by the Union Pacific in 1901 there was active, vigorous, earnest and substantial competition between the Ogden and El Paso routes; (*b*) that the ownership of the Central Pacific by the Southern Pacific did not prevent such competition, and (*c*) that the competition which existed in 1901 was suppressed as a result of the acquisition of control of the Southern Pacific by the Union Pacific.

(22) HOW THE QUESTION OF THE PURCHASE OF THE CENTRAL PACIFIC BY THE UNION PACIFIC AROSE AND CAME TO BE SPOKEN OF IN THE UNION PACIFIC CASE.

In attempting to justify its acquisition of control over the Southern Pacific, the Union Pacific contended that its only motive for acquiring the Southern Pacific was to get control of the Central Pacific to California and the north and south lines in California; in other words, it was argued that the Union Pacific did not acquire the Southern Pacific in order to control the Sunset-Gulf route of the Southern Pacific. On

the contrary, the Union Pacific claimed that the Sunset-Gulf route was something of a hindrance and that the Union Pacific desired only to own and retain the Central Pacific line to California and the north and south lines within the State.

In reply to the argument of the Union Pacific, the Government contended that no matter what the motive of the Union Pacific might have been it did acquire a competitor, and did, in fact, suppress competition as a result. It was not contended in the argument that it would have been unlawful for the Union Pacific to have acquired the Central Pacific. Indeed, it seemed to be assumed, or to be taken for granted, that because the Act of July 1, 1862, authorized the constituent lines *provided for therein* to become consolidated as one company such authority to consolidate continued (even after the Anti-trust Law of July 2, 1890) no matter how changed or altered the Union Pacific and Central Pacific lines might have become by extensions, amalgamations, consolidations, etc. It was at no time suggested, however, that the ownership of the Central Pacific by the Southern Pacific was a violation of the Anti-trust Law of July 2, 1890. The Government did not contest the argument that if the Union Pacific had bought the Central Pacific alone no case could be made out under the Anti-trust Law of July 2, 1890.

But the Union Pacific had never bought the Central Pacific, so that when the case was argued in the Supreme Court it was, of course, clear to the judges that the legality of such a purchase was not before the court for determination. It would, therefore, have been entirely unnatural for the court to render any decision upon that point.

Having in view, however, *the possibility* of such a purchase *in the future,* it would have been entirely natural for the court to say that although the acquisition of the Southern Pacific by the Union Pacific violated the Anti-trust law nevertheless their decision to that effect should not be taken to forbid the acquisition of the Central Pacific by the Union Pacific, *provided, of course, the owner of the Central Pacific was minded to sell.*

In *MacFadden* v. *United States,* (1909) 213 U. S. 288, it is said:

> "The language of the opinion should be interpreted in the light of the facts of the case."

Stearns v. *Wood,* (1915) 236 U. S. 75:

> "The province of courts is to decide real controversies, not to discuss abstract propositions."

A consideration of the foregoing makes very clear what was meant by the Supreme Court when it said (226 U. S. p. 97):

> "As to the suggestion made at the oral argument by the Attorney General, in response to a query from the court as to the nature of the decree, that one might be entered which, while destroying the unlawful combination in so far as the Union Pacific secured control of the competing line of road extending from New Orleans and Galveston to San Francisco and Portland, would permit the Union Pacific to retain the Central Pacific connection from Ogden to San Francisco, and thereby to control that line to the coast, thus effecting such a continuity of the Union Pacific and Central Pacific from the Missouri river to San Francisco as was contemplated* by the acts of Congress under which they were constructed, it should be said that nothing herein shall be considered as preventing the government or any party in interest, if so desiring, from presenting to the district court a plan for accomplishing this result, or as preventing it from adopting and giving effect to any such plan so presented."

* In using the word "contemplated" the Supreme Court does not interpret the Act of July 1, 1862, as commanding a consolidation of the roads operating the continuous line from the Missouri River to the Pacific Ocean. The provision respecting consolidation was to give statutory authority for consolidation, without which the right to consolidate would not have existed. In *Clearwater* v. *Meredith* (1863), 68 U. S. (1 Wall.) 25, 40, the court, in dealing with an act authorizing the consolidation of railroad corporations, said that "the act of the legislature of Indiana allowing railroad corporations to merge and consolidate their stock, *was an enabling act—was permissive, not mandatory.*" In *Nugent* v. *The Supervisors* (1873), 86 U. S. (19 Wall.) 241, 249, speaking of another statute authorizing the consolidation of railroad companies, the court said that "It was therefore contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred *might* occur." In other words, the consolidation of the Pacific Railroads was within the contemplation of Congress in the sense that Congress gave them authority to consolidate if they desired to do so.

In a word, the Supreme Court decided that if the proprietor of the Central Pacific lines desired to sell them to the Union Pacific nothing in its opinion or in the decree to be entered in conformity therewith should be deemed to forbid such a sale. It is little short of remarkable that the Government should misunderstand the meaning of so obvious and sensible a suggestion.

The Government seems to be of the opinion that there is something in the paragraph quoted, or that something occurred in the Supreme Court during the argument which is, in practical effect, a decision that the Southern Pacific was unlawfully in possession of the Central Pacific.

In the examination of Mr. Kruttschnitt, counsel for the Government questioned him as follows (II R, 784-785) :

> "Q. Did Attorney General Wickersham inform you that the Supreme Court, or some members of it, in the course of the argument had inquired as to whether or not the holding of the Central Pacific by the Southern Pacific was not in violation of the Sherman Act?
>
> A. You ask if he informed me of that?
>
> Q. Yes.
>
> A. No, he did not, because I knew, and our attorneys were present at the time the Supreme Court judge, on the argument of the case, made that remark; but he did not make it in just the way that you do. It may have been at some other time, but this whole thing seemed to have started in the argument of the case before the Supreme Court, when one Justice said: 'If the Union Pacific bought this Southern Pacific simply to get the Central, why not let them have the Central part alone and prohibit them from having the rest?" And one of his associates very pertinently remarked: 'That is all right, but what would the Southern Pacific stockholders say to that proposition?'
>
> Now, it occurred that way, and it occurred in the presence of our counsel and was so reported to me after it occurred."

It would have been indeed remarkable if the Supreme Court had decided that the ownership of the Central Pacific by the Southern Pacific suppressed competition, when the testimony and the argument of the Government were the other way; in

fact, we may say that it would have been remarkable if the Supreme Court had so held or intimated concerning a matter about which there was no argument or contention either way, laying aside for the moment the fact that the Government argued the direct contrary in insisting that notwithstanding the ownership of the Central Pacific by the Southern Pacific, the lines via Ogden and El Paso were in active and vigorous competition.

It is true that the opinion assumes, for purposes of argument merely (but nothing more), that there would be nothing illegal in the ownership of the Central Pacific by the Union Pacific, but the opinion does not decide that such an acquisition would be lawful. The court said (226 U. S. 93):

> "Conceding for this purpose that it might have been *legitimate,* had it been *practicable,* to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done," etc.

Again (226 U. S. 93):

> "*Because it would have been lawful* to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road."

These extracts clearly show, as already stated, that what the court was considering was the lawfulness of a possible acquisition of the Central Pacific line by the Union Pacific, and not whether the Southern Pacific ownership of the line was illegal.

We have elsewhere shown that the court did not decide that the Union Pacific could lawfully acquire the Central Pacific. It simply declared that its opinion should not be construed to adjudge that it would be unlawful for the Union Pacific to do so; and the only effect of the extracts from the opinion above quoted is to leave the question of the power of the Union Pacific to buy the Central Pacific an open and undecided question.

(23) HOW THE PLAN FOR THE PURCHASE OF THE CENTRAL PACIFIC BY THE UNION PACIFIC FROM THE SOUTHERN PACIFIC FAILED OF ACCOMPLISHMENT.

The decision in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, December 2, 1912, provided that any plan to carry into effect the dissolution ordered should be presented to the District Court within three months after it had received the mandate of the Supreme Court. In negotiations between the Union Pacific and the Government respecting such a plan the Attorney-General advanced the opinion that the ownership of the Central Pacific by the Southern Pacific was a violation of the Anti-trust Law of July 2, 1890, and insisted that if the Southern Pacific did not immediately divest itself of ownership in the Central Pacific, proceedings for dissolution would be commenced. Under these circumstances the Union Pacific and Southern Pacific (*the latter not yet released from the control of the former*) negotiated for the sale of the Central Pacific by the Southern Pacific to the Union Pacific. This sale, however, involved difficulties which could only be met by agreements collateral to the sale, and these agreements required the approval of the Railroad Commission of California. The application for such approval was made February 17, 1913, whereupon the Western Pacific Railway Company (incorporated in 1905 to build from San Francisco to Salt Lake) intervened, and the proceedings took such a course that the Railroad Commission of California (in two opinions rendered February 24, 1913, Nos. 477 and 478; D. Ex. 25, 26) refused in effect to approve the agreement between the Southern Pacific and Union Pacific. As a result, the agreement was abandoned, and another plan for the disposition of the stock of the Southern Pacific owned by the Union Pacific was decreed and carried into effect.

It is important to describe the transaction sought to be carried into effect by the Union Pacific and Southern Pacific, noting the particulars to which the Railroad Commission offered no objection and the particulars which the Commission declined to approve.

The several features of the plan and the views of the Commission regarding them were as follows:

(1) The stock of the Southern Pacific held by the Union Pacific was to be transferred to the stockholders of the Union Pacific and Southern Pacific in the proportion of one share of Southern Pacific stock in the Union Pacific treasury to each four shares of Union Pacific stock held by its stockholders generally, and one share of said Southern Pacific stock in the treasury of the Union Pacific to each three shares of Southern Pacific stock owned by stockholders other than the Union Pacific.

With this method of distributing the stock of the Southern Pacific in the treasury of the Union Pacific, the Railroad Commission said it had "no direct official concern," but it invited attention to the suggestion that such a method would still render possible the control of the Southern Pacific by the Union Pacific (Decision No. 477, ft. p. 4; and Decision No. 478, ft. p. 4).

Before proceeding to consider the other details of the agreement, we quote what the Railroad Commission of California said in this connection (Decision No. 477, p. 5):

> "The only thing provided in the agreement which was in accordance with the positive admonition of the Supreme Court is the sale by the Union Pacific of the stock of the Southern Pacific. Everything else provided in the agreement is, in our judgment, in excess of the requirements of the Supreme Court; but it is presupposed in the agreement that the design of the Attorney General of the United States was to bring about at the same time the dissolution of the Southern Pacific and Union Pacific and the Southern Pacific and the Central Pacific."

(2) By the agreement the Union Pacific was to assume approximately $200,000,000 of bonded indebtedness of the Central Pacific and to pay to the Southern Pacific about $104,000,000 (Decision No. 477, ft. p. 6). In consideration of this price, the stock of the Central Pacific was to be transferred by the Southern Pacific to the Union Pacific, and all the leases of

Central Pacific properties held by the Southern Pacific were to be cancelled.

The Commission held that it had no power to interfere with this feature of the plan. In order, however, to make clear its order and determination concerning those features (hereafter to be considered) with which it did have power to deal, the Commission prefaces its opinion with its views respecting the effect of the plan on both interstate and intrastate traffic, as follows (Decision No. 477, pp. 7-10):

> "The plan presented to us in this agreement contemplates the control by the Union Pacific not only of a line to the coast, but also of many important feeders owned by the Central Pacific in northern and central California. As a matter of fact, the acquisition of the entire Central Pacific holdings by the Union Pacific will give it an entry into all of the important centers of population in California north of the Tehachapi Mountains, while its control by stock ownership of the San Pedro, Los Angeles and Salt Lake Railroad Company from Salt Lake to Los Angeles, with the connections of the Oregon Short Line from Salt Lake to Ogden, gives it an entry into the region south of the Tehachapi Mountains, and its ownership of the Oregon Short Line and the Oregon Railway and Navigation Company gives it access to Portland and other Oregon points. The Southern Pacific, on the other hand, while it is left with its Coast line from San Francisco to Los Angeles, will, in our opinion, if this agreement is consummated, compete at a disadvantage at all points north of the Tehachapi Mountains with the Union Pacific-Central Pacific line. In fact, it is in evidence in this case from the testimony of the representatives of the Southern Pacific itself, that that line will be excluded from practically all of the deciduous fruit business in California, as well as a major portion of the dried fruit business and a large portion of the citrus fruit business originating at points north of the Tehachapi Mountains.
>
> We do not believe it necessary to the determination of the questions that are now presented to us to present in detail the traffic conditions which we consider will be brought about if the rearrangement contemplated by this agreement is consummated. Mr. Sproule, president of the Southern Pacific, testified that 47 per cent. of the traffic carried by the Southern Pacific as it now exists,

controlling as it does the Central Pacific to Ogden, passes through the El Paso gateway. This, of course, includes practically all the Southern Pacific's traffic originating south of the Tehachapi Mountains and all of the traffic moving by water from Galveston over the Southern Pacific and Gulf line, and necessarily includes but a small percentage of the business produced north of the Tehachapi Mountains. Under present conditions, the Southern Pacific, having regard solely to traffic convenience, carries by way of its Sunset route only a comparatively small amount of freight which originates at points north of the Tehachapi Mountains. It would appear that under the circumstances of this case, the traffic will largely move over the most convenient and expeditious route. Such being the case, we are justified in concluding that for most of the traffic originating north of the Tehachapi Mountains, the Sunset route is a less convenient route than the route by way of Ogden gateway, and if this conclusion is correct, the Southern Pacific will compete at a disadvantage for most of this traffic when the ownership of the lines through the Ogden gateway and the El Paso gateway is in the hands of competing owners. Thus, if the Union Pacific secures control of the Central Pacific with its feeders as far south as Goshen and into practically all of the important commercial centers in northern and central California, the Southern Pacific will be placed in the position of the inferior road at all of these points, while if the Union Pacific were to secure merely the control of the main line of the Central Pacific from Ogden to San Francisco, the condition would be reversed and the Union Pacific-Central Pacific line would compete at a disadvantage or be compelled to build additional feeders.

We do not pretend to say, nor do we consider it necessary to decide, how serious an impairment of the Southern Pacific will be brought about by the securing of the Central Pacific main line and feeders by the Union Pacific, but we are of the opinion that the present commanding position of that road cannot be maintained under the contract which is presented to us for approval, and that there is room for grave fear that if the agreement is carried out this State will, instead of securing two strong competing lines, secure one dominant line and one much impaired line.

The desire of the Supreme Court and the Attorney General to produce active competition between these two

transcontinental lines, of course, is founded in the belief that such competition will produce advantageous results to the shippers. We do not believe, however, that any appreciable reduction of transcontinental rates will be brought about by the unmerging of these lines, particularly under the terms of the agreement here under consideration. If, however, active and *bona fide* competition is produced between these lines there will be more striving after business and, consequently, probably some improvement in service, how great it is impossible to determine. We do not believe that the improvement in service will be very marked, because of the fact that the freight east and west through both the Ogden and El Paso gateways is at the present time carried in active competition with two other transcontinental lines, namely, the Atchison, Topeka and Santa Fe Railway Company and Western Pacific Railway Company.

Believing as we do that the plan here under consideration will not substantially benefit the shippers of transcontinental freight, either in rates or in service, it is well to consider what, if any, effect will be the natural result of this arrangement upon local traffic. At the present time, the local lines of the Southern Pacific and the Central Pacific form one system within this State, reaching from Oregon to the Mexican line, and from Yuma and a point near Reno on the east. All local lines of these two systems are now under the control of one agency and operated as a unit. The result of the reorganization plan as set forth in this agreement will be the substitution as to a great part of this territory of two agencies to perform the work now performed by one.

While the representatives of both the Union Pacific and the Southern Pacific state positively that it is contrary to their policy to permit the reorganization scheme to increase the rates or to interfere with the service locally within the State, yet we cannot refrain from observing that this result usually follows upon a substitution of two agencies in the performance of a service theretofore performed by one. We invariably have it urged upon us in rate controversies before the Commission, where rates are to be made over two connecting lines that the joint movement over two connecting lines is more expensive to the carriers in the aggregate than a single movement over one line between the same points. Therefore, regardless of the present disposi-

> tion of the parties hereto, we feel that serious consideration must be given by the Commission to the possibility or probability of applications which may hereafter be made by carriers to increase rates in this State in cases where, as the result of the consummation of this agreement, points now upon one line may, by reason of the dismemberment of the Southern Pacific lines in this State be found located one solely on the Southern Pacific and the other solely on the Central Pacific.
>
> It is our disposition to believe that it would be better for the local business within this State if the local lines now controlled by the Southern Pacific could remain under the control of one agency and not be separated and given over to the control of two. This conclusion, in conjunction with the opinion we have already expressed that the advantage to shippers as to transcontinental freight will be negligible if the provisions of this contract are carried out, leads us to suggest that it would be better to adopt the other method already suggested of bringing about the design of Congress in providing that the Central Pacific and the Union Pacific should be one continuous transcontinental line, namely, by the sale or long term lease of the line of the Central Pacific from Ogden to Sacramento to the Union Pacific and the provision for a trackage right from Sacramento to bay points for the Union Pacific and the retention by the Southern Pacific of the remainder of the Central Pacific system. Having given our views upon that portion of the contract, which while involved in the entire plan does not specifically require our approval, we shall now consider those matters for which our approval is required."

It is thus to be seen that the Railroad Commission was of the opinion that the plan presented would (*a*) probably not be advantageous to interstate shippers, and (*b*) that it would certainly be disadvantageous to intrastate shippers. Repeatedly through its opinions the Railroad Commission vigorously argues against a sale of any of the properties of the Central Pacific except the line from Sacramento to Ogden.

(3) The Central Pacific was to lease its line of railroad from Tehama, California, to the Oregon line to the Southern

Pacific for 999 years and sell its line from Weed, in Siskiyou County, California, to Natron, Oregon, to the same company.

These items of the plan had the approval of the Railroad Commission, its preliminary objection to the details thereof having been met and acceded to by the companies. (The Commission agreed to a lease for 999 years upon the ground that it would have approved a sale of the property so leased and that inasmuch as a sale was impossible, owing to mortgages, etc., a lease in perpetuity should have the approval of the Commission.)

(4) The next item in the plan was a lease for 999 years by the Southern Pacific to the Central Pacific of trackage and running rights for through freight trains only, between Redwood City and San Francisco.

In explanation of this item it is to be noted that in 1910 the Central Pacific extended its line from Niles through Newark across the lower waters of San Francisco Bay via Dumbarton Point (hence the name Dumbarton Cut-off) to the line of the Southern Pacific at Redwood.

This part of the agreement between the Southern Pacific and Union Pacific gave the Central Pacific trackage rights for through freight trains only, from Redwood to San Francisco, so that it might route its through freight trains to San Francisco by its own line to Redwood and thence by virtue of this trackage privilege, over the Southern Pacific tracks from Redwood to San Francisco.

Speaking of this feature of the agreement, the Commission said that it would approve (Decision No. 477, p. 11)

> "the Redwood-San Francisco lease, except as to the term thereof. Except in those cases where we would approve a sale of the property and a sale is only prevented by the outstanding obligations which are liens upon the property, we think a perpetual lease is not warranted. In other words, except in those cases where we would approve a sale we will not approve a perpetual lease. This is equally applicable to the term of 999 years provided in all of the other leases which are hereafter to be considered.
>
> The Commission is, however, willing to permit the leases in this case to run for a period of fifty years and

> for the further period until the Commission or other competent state authority, after notice and hearing, directs their cancellation or modification, whereupon such cancellation or modification shall be made."

(5) The last item was the lease for 999 years by the Southern Pacific to the Central Pacific of its line of railroad from Sacramento by way of Benicia to Oakland (sometimes called the Benicia Short Line or Benicia Cut-off) for joint and equal use with the Southern Pacific to the exclusion of any other line except with the permission of both companies; and to this there was added a provision for a lease for 999 years by the Southern Pacific and Central Pacific to one another of the joint use of their respective terminals, including industry tracks, at all junctions of their respective lines within said limits, to which no other company would be admitted except by the consent of both the Southern Pacific and Central Pacific.

Respecting these provisions, the Commission said (Decision No. 477, pp. 11 and 12):

> "The provision for the lease of the Benicia short line and the joint use of terminals, including industry tracks, are the ones to which we find the most serious objection. The agreement contemplates that the Southern Pacific shall grant to the Central Pacific for the Union Pacific the equal joint use and possession of the short line from Sacramento to Oakland via Benicia, at an annual rental, and that no additional company may use the tracks so leased unless it has first secured the written consent of both the Southern Pacific and the Central Pacific. In other words, these two companies are to have the use of these very desirable tracks to the exclusion of any other railway company, unless both the Southern Pacific and the Central Pacific concur in letting in the stranger. We recognize fully that this property now belongs solely to the Southern Pacific Railroad Company and is operated solely by the Southern Pacific. Nevertheless, the grant by the Southern Pacific of the use of its tracks to one independent competitor (the Central Pacific) while refusing to grant the same rights to another independent competitor (the Western Pacific) would work a discrimination which the welfare of this State does not permit and which the Commission will not sanction. If the Southern Pacific is going to throw its property open to

> one of its several independent competitors, it must play fair with the others and permit its use by them also, on terms which shall provide for a just compensation, to the extent to which the capacity of the property reasonably permits. If the present plan of a sale by the Southern Pacific of the Central Pacific stock to the Union Pacific be abandoned and in lieu thereof the Union Pacific shall buy the line of the Central Pacific between Ogden and Sacramento or secures long term lease thereof, with lease or trackage rights thence into San Francisco, other considerations might arise. It might then be held that the Union Pacific would be acting in accordance with the plan of Congress to secure a connected line of railway via the Union Pacific and the Central Pacific to the coast and that the Central Pacific was not acting voluntarily in granting the trackage rights to enable the Union Pacific to reach the coast from Sacramento. This effect of the Federal statutes heretofore referred to would confine the right to an outlet for the Union Pacific to the Stockton-Niles route."

In its order, the Commission directed (*a*) that no lease should exceed a term of fifty years except the lease of the line between Tehama and the California-Oregon line; (*b*) that in the event the Southern Pacific granted trackage rights in respect of the Benicia Short Line to one company it should grant it to other companies on the same terms, and (*c*) that in the event any of the companies party to the agreement granted the use of terminals, including industry tracks, to one company the same privileges should be granted to other companies upon like terms.

In other words, the Commission held (*a*) that if the Union Pacific acquired *all* the Central Pacific lines it would not be permitted to obtain from the Southern Pacific exclusive trackage privileges over any of the Southern Pacific lines, and (*b*) that if, however, the Southern Pacific retained all the Central Pacific lines except the line from Sacramento to Ogden the Commission would recognize the right of the Union Pacific to secure exclusive trackage rights over the Central Pacific from Sacramento via Niles to Oakland and thence by boat to San Francisco as legitimately appertaining to the through line from the Missouri River to the Pacific Ocean, provided for in

the Act of July 1, 1862. In short, adopting for a moment the point of view of the Railroad Commission of California, it did not intend to create "combinations" in carrying out the unmerging required by the decision of the Supreme Court.

It having thus been found impossible to arrange a workable separation of the Central Pacific from the Southern Pacific, the negotiations came to an end.

(24) THE COMPETITIVE CONDITIONS EXISTING BETWEEN THE OGDEN ROUTE AND THE SOUTHERN PACIFIC SUNSET-GULF ROUTE BEFORE THE UNION PACIFIC MERGER OF 1901.

In point twenty-one of this Statement of the Case, we quoted extensively from the decision in *United States* v. *Union Pacific Railroad Co.,* (1912) 226 U. S. 61, respecting the competitive conditions which existed between the Ogden route and the Southern Pacific Sunset-Gulf route before the Union Pacific merger of 1901.

At the moment, we do not think that we need dwell further upon this point.

(25) THE NON-COMPETITIVE CONDITIONS BETWEEN THE OGDEN ROUTE AND THE SOUTHERN PACIFIC SUNSET-GULF ROUTE DURING THE UNION PACIFIC MERGER FROM 1901 TO 1913.

In *United States* v. *Union Pacific Railroad Co.,* (1912) 226 U. S. 61, it was held that the acquisition of control of the Southern Pacific by the Union Pacific had the effect of restraining trade and commerce during the merger.

Upon this point we leave the matter as it is set down in that decision.

(26) THE RETURN TO THE CONDITIONS WHICH EXISTED PRIOR TO THE MERGER OF 1901, AND THE RESUMPTION OF COMPETITION BETWEEN THE OGDEN ROUTE AND THE SOUTHERN-PACIFIC SUNSET-GULF ROUTE CONSEQUENT UPON THE UNMERGER.

William Sproule, President of the Southern Pacific Company, testified that the policy of the Southern Pacific with respect to the conduct of its business is now the same "as it was prior to the time we became dominated by the Union Pacific, 1901" (I R. 201):

Speaking of traffic conditions in seaboard territory, John B. De Friest said (I R. 305):

> "I think the situation now is about the same as it was before the merger."

Julius Kruttschnitt, Chairman of the Executive Committee of the Board of Directors of the Southern Pacific Company, testified (II R. 739-740):

> "Q. Since the unmerger in 1913 of the Union Pacific and Southern Pacific, has this competition between the Ogden route and the Sunset-Gulf route continued?
>
> A. It has.
>
> Q. What is its condition now?
>
> A. It is active.
>
> Q. Carried on in the same way in which you have indicated?
>
> A. Yes.
>
> Q. I believe you have already answered it, but I will ask you again: Have you ever considered it to the interest of the Southern Pacific to influence this competition by impairing in any way the service over the Ogden route?
>
> A. We have not; and I could not conceive of any officer being stupid enough or short sighted enough to try to do it; because, as I have said before, it would be suicidal for Southern Pacific interests to try to get freight to move away from the Southern Pacific and then lose it, and not get it for the Sunset, but lose it to the Atchison.
>
> Q. Would it be possible, in your opinion, to impair the service on the Ogden routes west of Ogden and con-

fine the effects of that impairment of service to business competitive with the Sunset-Gulf route?.

A. No, it would be impossible.

Q. Please explain that.

A. It would be impossible, for the reason that, if the service were not good on the Central Pacific, people would decline to ship there, and then we would have only a small chance of getting for the Sunset route the freight that had been lost to the Central Pacific. The shipper would probably exercise his option to ship via Santa Fe or Western Pacific, and we do not want to risk that.

Q. Would any lessening of the efficiency of the service over the Ogden route be felt in its influence on traffic which was not competitive with the Sunset-Gulf route?

A. Will you please repeat that?

Q. That is, would it affect the traffic which would seek to get over the Ogden route, which is not competitive with the Sunset-Gulf route?

A. It would affect it to this extent: if we lowered the efficiency of the service, or the excellence of the service, we would lose it from the Central Pacific, without any certainty of getting it by the Sunset."

(27) THE TREATMENT OF THE UNION PACIFIC BY THE CENTRAL PACIFIC BOTH BEFORE AND SINCE THE UNION PACIFIC MERGER.

In Mr. Kruttschnitt's testimony just quoted, we have shown how the self-interest of the Southern Pacific requires it to give to the Union Pacific the highest order of co-operation in its operation of the Central Pacific. In this case there is not the slightest complaint that the co-operation between these two companies in the matter of the operation of the properties is not most friendly and intimate.

Mr. Kruttschnitt testified (II R. 729-730) as follows:

"Q. After the unmerger in 1913, have there been any material changes in the arrangements for handling through business via the Ogden route?

A. None in policy. Of course schedules are rarely kept in effect any great length of time. In other words,

there are questions of competition with other lines that may determine the times of leaving or the times of arriving; but those changes were always reached by agreement between the officers of the two roads.

Q. In your opinion, is the arrangement for operation of the through line via Ogden from San Francisco east over the Union Pacific as good now as it was during the merger period?

A. It is as good. I think it is better, because we have been making improvements all the time, and my judgment about the matter is borne out by the judgment of the public, by the way they use the line, by the amount of traffic both passenger and freight that we get over it.

Q. During the whole of the period above referred to, what have been the relations betweeen the officials of the Southern Pacific Company and the officials of the Union Pacific Railroad Company with respect to the arrangements for the handling of through traffic via Ogden?

A. They were always perfectly cordial and co-operative.

Q. And that continues so to the present time?

A. Yes; I do not recall any complaints made since the unmerger.

Q. What kind of through service has been produced by the arrangements for the handling of through business via Ogden?

A. Well, we have, as I said, I think the best transcontinental service that way of any road in the United States, and my judgment is borne out by the verdict of the public in using the line, and from expressions we get from people who travel over the line and who make shipments over it. And then we have the still better evidence, of the traffic that we control that way."

Upon his cross-examination Mr. Kruttschnitt testified (II R. 824):

"Q. You have spoken of the Central Pacific Railroad and the Union Pacific Railroad as operated as one line. By that you meant, did you not, that they have had joint rates and have operated through cars and through trains, both freight and passenger?

A. No; I meant much more than that. We have arrangements with a good many lines for through rates, through cars and passengers, but I stated that with no line was our co-operation as close as with the Union

Pacific, ever since I have known anything about it; and I understand that our treatment of them, after I went to California, was in no wise different from what it was before.

Q. Well, in what other ways than in arranging for through rates, through cars and through trains and through billings have you co-operated?

A. Well, in this way: your connection may suggest a new train or a through car; you may say that you see no necessity for a new train or no necessity for a through car, and you do not care about hauling it. Indeed, that you have balanced expected increased revenues with expected increased expenses, and that you think it will not pay, and you don't propose to do it. When propositions from the Union Pacific have come, we have never taken that position.

Q. Now, is there any other respect in which the line has been operated as a through line?

A. Well, after making through rates, hauling of the through trains that they want you to haul, hauling all the through cars that they ask you to haul, co-operating with them in getting business as we have done, I don't see how much more you can do, unless you turn over the management of the road to them.

Q. I think you misunderstood the question. I did not ask you what more you could do, but is there any more that you do do?

A. Then I will say no; I do not see how we could do any more."

Judge Robert S. Lovett, Chairman of the Executive Committee of the Union Pacific Railroad Company, called as a witness for the Government, testified (I R. 290):

"We work preferentially with the Southern Pacific."

Also (I R. 296):

"The Central Pacific is far and away the best connection for the Union Pacific to Central California. It is the shortest line and the best railroad in every sense of the word."

Again (I R. 297):

"Q. Well, could that (service) be increased or in any manner changed by the separation of the Central from the Southern Pacific control?

A. I would not like to say that, because I think the Southern Pacific Company is working now and has been ever since the merger, as it certainly was during the merger, the Ogden gateway very effectively. How long it will continue to do that I do not know. . . . I want to make my position clear on that. I cannot say that the situation would be improved beyond what it is now by the Southern Pacific, because up to this time, whatever it may do in the future, the Southern Pacific is working the Central Pacific very efficiently."

Lewis J. Spence, Director of Traffic for the Southern Pacific Company, testified (III R. 1045-1047):

"Q. . . . what are the relations between the Union Pacific and the Southern Pacific in respect to the through route via Ogden?

A. There are but few connecting lines whose relations are as close and co-operative. There are no connecting lines whose relations are closer and more co-operative than the relations between the Union Pacific and the Southern Pacific. The lines are operated as one connected, continuous, line.

Q. What about the personal relations between the officers of those lines in respect to mutual satisfaction as to the nature and extent of the co-operation?

A. They are exceedingly cordial and co-operative. I do not know of a complaint on either side, and I know of no cause for complaint on either side.

Q. What arrangements have you, for instance, with them in regard to advertising the Ogden through route?

A. We joined the Union Pacific in advertising the through train service between Chicago and San Francisco by the annual creation of a joint advertising fund, to which the lines contribute on a *pro rata* basis. Very much the largest share of that fund is spent in westbound advertising, and is placed in the hands of the Union Pacific for that purpose.

Q. They spend the fund to which you contribute as they see fit?

A. Yes.

Q. Can you give us the approximate amount annually which is expended for this westbound advertising?

A. The amount spent, between Chicago and San Francisco, during the current year will be about $140,000.

Q. What have been the results of this co-operative

effort to afford the public a through line via Ogden? What kind of a line is that through line thus created?

A. Briefly stated, the results of this co-operation have been to establish the best through transcontinental line, taking passenger and freight service together, across the country.

Q. Of all the all-rail lines that you have mentioned, in your opinion, the Ogden route is the best?

A. Yes.

Q. Mr. Spence, state whether or not the Union Pacific is more or less at the mercy of the Southern Pacific now than it was just before the merger in 1901, in respect to securing good service, reasonable terms and facilities, and so forth, for engaging in transcontinental business via the Ogden route; and give the facts upon which your answer is based.

A. Prior to 1901 the Union Pacific had, beside the Southern Pacific west of Ogden as a connecting line, its rail route to Portland and its steamship line thence to San Francisco as its only alternative route. Since that time the Western Pacific and the San Pedro, Los Angeles & Salt Lake railways have been constructed, affording the Union Pacific various routes; the Interstate Commerce Law was amended in 1906, delegating authority to the Interstate Commerce Commission to establish through routes and joint rates, which gives the Union Pacific an absolute guaranty of the continuation of through routes and joint rates; in 1910 the Commission was given authority to suspend advanced rates, and by the same amendment to the law the shipper was given authority to route his freight, and the carriers were required to respect his routing.

Q. What kind of service is maintained by the Southern Pacific over its end of the Ogden route; that is between Ogden and San Francisco? I mean in respect of the maintenance of the road as well as in respect of the equipment and all the elements that go into service?

A. The service on the line west of Ogden is not excelled anywhere, under like conditions.

Q. What do you mean by 'under like conditions'?

A. The character of the country, the density of the traffic, and the population.

Q. State any facts that you may know, tending to show whether the Southern Pacific Company has any interest or motive to impair this service over the Ogden route.

A. In the first place, the Southern Pacific Company has a very large investment in the Central Pacific, upon which it is anxious to earn a return. In the second place——

Q. Just give the general character of that investment, without going much into detail.

A. It owns the stock, and is the guarantor of the bonds.

In the second place, the Southern Pacific is dependent upon the Central Pacific, west of Ogden, as the only route by which it can successfully compete for the traffic to and from the middle west territory, and also dependent upon that route to successfully compete for a large share of the traffic to and from the Atlantic seaboard territory for which the Sunset-Gulf route is physically unable to compete. These conditions not only afford no motive for impairing the service, but they afford every incentive for keeping the service up to its maximum efficiency.

Q. Could you impair the service on your part of the Ogden route, with a view to benefitting the Sunset-Gulf route in respect to the limited traffic for which those two routes offer alternative routes, without at the same time impairing the service and injuring the Ogden route in respect to this traffic as to which the two lines do not offer alternative routes?

A. No."

Again (III R. 1151):

"Q. Is the Sante Fe today the strongest all-rail line in the field?

A. No. The Union Pacific-Ogden route is the strongest line."

See also Defendants' Exhibit (Spence) No. 81, showing commercial freight interchanged between Southern Pacific Company and Union Pacific Railroad Company at Ogden, Utah, for the fiscal years ending June 30, 1913, and 1914 (introduced III R. 1063) from which it appears that the tonnage was as follows:

	1913 Tons	1914 Tons
Eastbound	606,122	598,035
Westbound	547,861	469,406

Mr. Sproule testified (I R. 190):

> "Q. The strongest competitor of the Sunset route is the Atchison, Topeka & Santa Fe for California business; is that correct?
>
> A. I should say the strongest competitor is the Central Pacific-Union Pacific line."

He also testified that co-operation between the Union Pacific and the Central Pacific over Ogden "prevailed before the merger period and prevails since the merger period" (I R. 240).

(28) THE TREATMENT ACCORDED BY THE SOUTHERN PACIFIC TO ITS CONNECTIONS GENERALLY.

We have shown the treatment accorded by the Southern Pacific to the Union Pacific at Ogden. It is established by the testimony of Mr. Sproule that the Southern Pacific aims to co-operate and reciprocate with all other lines at Ogden with a view to the promotion of business; that is to say, the eastern lines shipping through Ogden give the Southern Pacific business and the Southern Pacific aims to reciprocate.

On this point Mr. Sproule said (I R. 197):

> "We aim to reciprocate with all those lines and interchange business with them and give them business to an extent that will justify them in working all they know how over our lines; that is, the through line via Ogden."

Mr. Kruttschnitt testified upon his cross-examination by the Government (III R. 770):

> "I have tried to indicate to you what the Southern Pacific construction is, how we have treated our connections whenever they have built in to us, but it does not follow at all that that same construction of those words ("business interests") would be given by some one else. I think we have given the right construction to them, because we have maintained very pleasant relations with all our connections, and from the mere fact that as strong a company as the Atchison, financially and in other respects, has never built short branches into

this local territory, leads me to believe that our policy has been broad and has been satisfactory not only to us but to them. It does not follow that any other company might do the same. I have known companies that did not do it at all that way; they try to build up tariff walls at junction points that could not be pierced by their competitors and connections."

And again (III R. 818):

"Q. The Western Pacific and the Southern Pacific have some agreement as to division on freight delivered by the Southern Pacific to the Western Pacific and vice versa?

A. That is a traffic matter, which I am not familiar with; but I do know that with the Western Pacific, as with the Atchison, we have thrown open our local points freely to them on divisions. I do not know what the divisions are, but on divisions that they have accepted as satisfactory, and it has put them, as it has the Atchison, into all local points of the Southern Pacific. It is in pursuance of our policy of having our lines used to the maximum extent."

The point of junction between the Rock Island and the Southern Pacific is El Paso. In speaking of the relations of his company with that road, Mr. Spence testified (III R. 1151-1152):

"Q. Does the Southern Pacific operate, with the Rock Island, as one continuous line from California to Chicago?

A. We operate very closely with the Rock Island. We co-operate with them very closely. We join in the operation of a through passenger train—two through passenger trains. We do not join in the operation of any through mail train or any through car. We do not join in the operation of through merchandise cars to points north of the Tehachapi Mountains, because the volume of the traffic does not justify it.

Q. What is there lacking to your describing the Southern Pacific-Rock Island operation from California to Chicago as one continuous through line?

A. I was seeking to show the differences, whatever they might be, between that route, in answer to your question, and the route through Ogden. The differences are that by the Ogden route we operate a through mail

train from Omaha to San Francisco on a schedule of two days, two hours and ten minutes, and a through mail car on the Overland Limited in two days, four hours and ten minutes. We do not operate either by El Paso in connection with the Rock Island. We do not operate through merchandise cars to central California via the Rock Island.

Q. When you use the term 'one continuous through route' to describe a route portions of which are operated by separate companies, what do you mean by that term?

A. I mean the joining in through passenger rates, in joint freight rates, in through billing and in through bills of lading. Those I should regard as the essential features to the operation of a connected continuous line. We do more. We operate the main trains as I have described, and a through mail car upon the fastest schedule made; because you know the government awards the mail to the schedule, and we carry the mail. We join in joint advertising, as I explained a day or two ago. We also do that for the Rock Island."

Mr. Spence further testified (III R. 1025):

"Q. Mr. Spence, what has been the policy of the Southern Pacific Company in respect of each transcontinental line which has made a junction with it from time to time?

A. The Southern Pacific has consistently opened each gateway as it has been reached by a transcontinental connection, and joined in the establishment of through rates and divisions.

Q. And have the through rates and divisions which it established been effective to enable the new transcontinental lines thus formed to engage actively in transcontinental business?

A. They have permitted them to engage in all business to and from points reached by the Southern Pacific.

Q. Was this policy adopted and enforced prior to the time when, by amendment to the Interstate Commerce Act, the Interstate Commerce Commission acquired authority to enforce the making of joint rates and fair divisions?

A. The policy was consistently pursued many years prior to the Interstate Commission having been empowered to establish through routes and joint rates."

In the construction of the Southern Pacific road from Mojave to New Orleans, the Southern Pacific made connections with (*a*) the Atchison, Topeka and Santa Fe at Deming, (*b*) the Rock Island at El Paso, and (*c*) the Texas Pacific at Sierra Blanca. To each of these connections it gave full co-operation. Indeed, from the time of its entrance into California about 1883 the Atchison, Topeka and Santa Fe had a lease of the line from Needles to Mojave and subsequently bought the line from the Southern Pacific. In addition it has had trackage arrangements with the Southern Pacific, giving it entrance into all the towns of California. (See Mr. Chamber's testimony, III R. 954-955, 984.)

These facts are proved by affirmative testimony, but equally significant is the absence of any testimony to the contrary in the record. In other words there is no complaint made by any witness that there has been a use of unfair methods by the Southern Pacific in the treatment of any of its connections.

(29) THE FAIR TREATMENT ACCORDED THE CENTRAL PACIFIC BY STANFORD, HUNTINGTON, HOPKINS AND CROCKER, NOTWITHSTANDING THEIR INTEREST IN THE SOUTHERN PACIFIC SUNSET-GULF ROUTE; AND THE CONTINUATION OF THAT TREATMENT DOWN TO THE TIME OF THE COMMENCEMENT OF THIS SUIT.

In financing themselves in their burdensome railroad construction it is clear, of course, that it was necessary for Stanford, Huntington, Hopkins and Crocker to put out and sell Central Pacific stock. There came a time, therefore, when it would be natural to expect the suggestion (if not more) that they were operating the Sunset-Gulf route in discrimination against the Ogden route and diverting traffic from the Central Pacific. This suggestion might naturally be expected to come from stockholders interested in the Central Pacific but not interested in the Southern Pacific, or from the Government itself.

There is no evidence whatever that they did divert traffic from the Central Pacific.

This very question is dealt with in the report of the United States Pacific Railway Commission (p. 115) which states one of the questions before the Commission and the reply thereto as follows:

> "(9) *Whether any traffic or business which could or should be done on the aided lines of said companies, has been diverted to the lines of any other company or to non-aided lines.*
>
> The evidence discloses that traffic has been diverted in a great variety of instances from the Union Pacific and Central Pacific railroads to other lines. As illustrations of such diversions the Commission refer to the following: The Southern Pacific, the California Pacific, and the Oregon Short Line. It would have been possible to have carried the traffic which was forwarded over the roads named by the Union Pacific and Central Pacific route. In the judgment of the Commission the controlling motive which has led to this alteration in the transit of freight has been the question of convenience and public advantage. It has not arisen from an intention to reduce the net earnings applicable to the percentage due to the United States. In the report of the Postmaster-General it is stated that this same diversion is practiced by his Department, and that he selects the best and the quickest routes because he thereby promotes public convenience."

Mr. Kruttschnitt testified on this point (II R. 806):

> "Q. In respect to transcontinental business, has the Central Pacific Railroad Company ever, through its officials, competed against the Southern Pacific Railroad Company, in practice?
>
> A. It could not. They were one and the same thing. The officers of the Central Pacific were the officers of the Southern Pacific. Money from the same pockets built both."

It is plain from this answer of Mr. Kruttschnitt that the very preservation of their own interests prompted Stanford, Huntington, Hopkins and Crocker to deal fairly with all the properties in which they were interested; and it appears from

the further testimony of Mr. Kruttschnitt that the self-preservation argument still obtains (II R. 732-734):

> "Q. During all this period, from the time you came to California to the present time, to what degree of efficiency have the lines standing in the name of the Central Pacific been maintained?
>
> A. I think and know that the lines of the Central Pacific are maintained in as good order as those of any railroad in the United States.
>
> Q. How does this standard of maintenance compare with the standard of maintenance of the lines composing the Sunset-Gulf route?
>
> A. As a rule, the maintenance of the Central Pacific, because of the great amount of money spent on it on account of the heavier, denser traffic, and on account of the country it runs through, is generally better than the Sunset lines, part of which, east of San Antonio and Texas, runs over low and wet countries where it is very difficult to keep the track up in as good condition as the tracks upon the deserts of Utah and Nevada. Up to a year ago it was our custom to carry out an annual inspection, and to mark each section on the entire line, graded as you would grade examination papers at college. Each feature of maintenance was marked as a maximum of ten, and the average cast up, and we gave prizes to the man who kept his section best. In looking over the last record we have, for 1913, as we abandoned this practice on account of forced economies, and on account of bad earnings in the last year, I find that the Central Pacific lines from San Francisco to Ogden averaged up 93.3 per cent.
>
> A part of the Sunset line from San Francisco to El Paso was a point under that; it was about 92.3.
>
> Q. Who made those markings?
>
> A. They were made by a jury of operating officers, a jury of about twelve men, division superintendents and division engineers, the general superintendent and the general manager.
>
> . . . . . .
>
> Q. What reasons exist for maintaining the Central Pacific line in question up to this high state of efficiency with respect to equipment, service and so on?
>
> A. The reasons are that if we do not maintain the line in the highest state of efficiency and give the best service, we will lose the business.

The Atchison is competing strongly for California business; the Western Pacific has, and we have always had competition in southern California with the San Pedro road.

Q. Is there any part of the traffic which you secure in competition with those lines which could not be induced to go over the Sunset route?

A. Yes, quite a good deal. There is a great deal of traffic that is competitive with the Santa Fe that we could not get to go over the Sunset at all.

Q. What, in your opinion, would be the result if you allowed the service to be impaired on the western end of the Ogden route?

A. It would be loss of traffic and necessarily loss of earnings; and there is only one word that could characterize such a policy, and that is that it would be suicidal, because the Southern Pacific has such an interest in the Central, through ownership of stock and through guarantee of bond issue that it can not afford to lose any traffic for the Central Pacific that it can possibly retain, and self-interest alone makes us keep it up to the highest standard of excellence.

Q. In your opinion would the loss of traffic which you say would result from impairment of service on the line west of Ogden inure to the benefit of the Sunset-Gulf route?

A. I do not think so; I doubt if any of it would go that way. It would be taken by the Santa Fe, which is our most vigorous and active competitor."

Testimony to similar effect was given by Mr. Kruttschnitt, II R. 740-741, 805-806, 808, and 824.

Edward Chambers, Vice-President of the Atchison, Topeka and Santa Fe Railway Company testified (III R. 973):

"The Southern Pacific always gave very good service over their Central Pacific line. Their passenger service I judge them by more than anything else."

Again (III R. 978-979):

"I know the Central Pacific-Union Pacific route has been improving right along up to to-day."

Again (III R. 979):

"Q. Prior to 1901, or prior to 1899 anyway, the great energies of the Southern Pacific Company had been directed towards the development of the Sunset line, had they not?

A. I would not say that their roadbed east of Los Angeles via El Paso was ever in better condition than around by Ogden and Sacramento. My observation and recollection is that it was just about the same. If anything, I should say the Central Pacific was a little better. It had, perhaps, more need of a better roadbed than any other line, on account of the large passenger business it did."

Again (III R. 983):

"Q. You said the Ogden route had always given good service. By that you included the Central Pacific as a part of the Ogden route?

A. Yes, sir.

Q. As a matter of fact, as far as you know, has not the Central Pacific been maintained *pari passu* with the Union Pacific, and substantially in the same condition, as to efficiency, from the beginning?

A. That is my understanding, and that is my experience. I never heard of any difference between them.

Q. Has not generally the traffic over the Central Pacific and Union Pacific been of greater volume than the traffic over the Sunset line?

A. Yes, sir.

Q. Always, has it not?

A. Yes, sir.

Q. And has not the Central Pacific and Union Pacific track been maintained at a higher standard, as a rule, than the tracks of the Sunset route—heavier rail and otherwise better adapted for good service?

A. I would say yes; that is my general understanding, although I have never heard much objection to either one.

Q. But, other things being equal, the care of maintenance is in proportion to the amount of traffic you have to handle over a line?

A. Yes, sir. . . .

Q. That is, your main lines are always maintained, or or usually maintained, at a higher standard than the branch lines?

A. Yes, sir. The needs of a passenger service largely control in the building up of the roadbed and tracks; that is the business that is sensitive to the condition of the road-bed and the tracks. That is what I judge the Central and Union Pacific route by. That has always been the principal passenger route of the Southern Pacific Company.

Q. And it always has been the principal passenger route transcontinentally, really, leaving out, of course, the Atchison as a very formidable competitor?

A. Not very effective yet, as to northern California.

Q. There is no doubt of the position and prestige of the Central-Union Pacific line as a passenger line—transcontinental?

A. No."

See testimony of Mr. Spence (III R. 1045-1047) under point twenty-seven of this Statement of the Case.

All this testimony is quite consistent with, indeed, it is in part explained by, the fact that there is a natural division of traffic between the Ogden and Sunset-Gulf routes. For instance, Mr. Kruttschnitt testifies (II R. 808):

"There is certain freight which the Southern Pacific Company can not get to go by the Sunset route. There is some which it can not get to go by the Central Pacific. There is some which may go either way."

Again (II R. 825):

"A. Where we have seen an opportunity of making the service of the Sunset line appear more attractive to the shipper than the other, we have done it; but there is a large amount of freight that we can not by any possibility get to go over the Sunset line. I have always known it, the public knows it, and that we help the Union Pacific to get for their line."

As an example of one of the numerous instances where the character of the traffic and not the choice of the Company governs the routing, R. P. Schwerin, Vice-president and General Manager of the Pacific Mail Steamship Company, testified that the eastbound traffic of the Pacific Mail Steamship Company travelled by the central route, via the Western Pacific, Santa Fe or Central Pacific because it was all fast

freight, and only unusual shipments, *i. e.,* local shipments, to some point in Texas or beyond, could go via El Paso (II R. 699-700).

These considerations are all re-enforced by the testimony of Mr. Spence, who shows that it is no longer possible, even without the Hepburn Act, for a carrier to route freight as it is minded to do, because an arbitrary routing without full regard to the service for which the shipment calls would swiftly end in disaster. (See III R. 1032-1033, 1050, 1058, 1059, 1175.)

(30) THE RADICAL CHANGES IN TRAFFIC CONDITIONS GENERALLY SINCE THE UNION PACIFIC MERGER OF 1901.

In the consideration of this case it is important to note the radical changes in traffic conditions generally since 1901, when the Union Pacific acquired control of the Southern Pacific.

Some of these radical changes are the following:

(a) Through routing and joint rates under the Hepburn Act of June 29, 1906 (34 Stat. 509).

The rule reviewed in *Southern Pacific Co.* v. *Interstate Commerce Commission,* (1906) 200 U. S. 536, that carriers might but need not agree upon through routing and joint rates has, of course, been superseded by the amendment to the act creating the Interstate Commerce Commission approved June 29, 1906, and called the Hepburn Act (34 Stat. 509). Under the terms of this act, the Commission is empowered to establish the through routes and joint rates which now prevail.

(b) The right of the shipper to route his own freight under Act of June 18, 1910 (36 Stat. 552).

By further amendment, Act of June 18, 1910 (36 Stat. 552), it was provided that the shipper, subject to regulation by the Commission, "shall have the right to designate" the routing of his freight.

Mr. Spence testified (III R. 1064):

> "Q. Mr. Spence, is there much unrouted traffic nowadays? I mean, is there any considerable quantity of traffic which a carrier receives without routing directions from the shipper?
>
> A. There is no appreciable amount of such traffic now. The shipper nearly always exercises his prerogative to designate the routing."

The effect of all this is well expressed by Mr. Sproule (I R. 207):

> "You understand that we have nothing to offer the shipper except his interest in his own shipments—no concession of any kind whatever that we can offer him; and the controlling factor in the routing of all business is not the wishes of the initial carrier, or of any other carrier, but it is the shipper's interest in his own business. That is a point which it is advisable we should not lose sight of in the technical question of the carriers controlling the routing. The carrier has no control over the routing except the service."

Judge Lovett testified (I R. 301) that the shipper is quite alive to his right to route his freight and that with him the question is largely one of service; that the location of the man who controls the routing, whether consignor or consignee, has a good deal to do with his choice of routes, and that where a choice of routes is practically immaterial to him his selection is a matter of personal idiosyncrasy arising perhaps out of a dislike for some officer of some particular line, or through personal likes or friendships—presuming, of course, that the rates and service are equal.

(c) The Panama Canal opened August 15, 1914.

The Panama Canal opened for business August 15, 1914 (Spence, III R. 1025). The effect of the Canal on transcontinental business is considered in the testimony of several witnesses.

Mr. Spence testified (III R. 1065) that the steamship facilities available through the Panama Canal amount to con-

siderably more than one million tons per annum in each direction.

Also (III R. 1066):

> "The steamship lines through the Panama Canal have already established very low rates; rates so low that the all-rail lines are finding it impossible to meet them."

Also (III R. 1066-1067):

> "The Sunset route, the Southern Pacific Company, has made application to the Interstate Commerce Commission for authority to make eastbound rates, which application was granted this week, between the California ports and New York, to approximately meet the competition through the Canal.
>
> . . . . . .
>
> The all-rail lines have not participated in the application, and are unable to do so for the reasons stated."

Mr. Spence also testified (III R. 1067) that "as to all the traffic of the Sunset-Gulf route which it is physically able to carry between California and the Atlantic seaboard territory it is in competition with the Pacific Mail Steamships through the Panama Canal"; and that as to traffic which mixed rail and water lines cannot engage in, "competition for that traffic will be between the several all-rail lines, the Ogden route and the Santa Fe and others."

Again (III R. 1067):

> "Q. And the competition for this transcontinental traffic which the Sunset-Gulf route is capable of carrying, that competition will be between the Sunset-Gulf route, the Santa Fe-Mallory Line and the water carriers through the Panama Canal?
>
> A. That is right.
>
> Q. What effect in respect to the rate upon that traffic has the coming into existence of the water carriers through the Panama Canal had?
>
> A. It has radically reduced it.
>
> Q. Which lines are the dominant rate making factors in respect to all that traffic which the Sunset-Gulf route is capable of carrying?
>
> A. The steamship lines through the Panama Canal.

Q. And those carriers now dominate the rate situation in respect to such traffic between California and the Atlantic seaboard territory?

A. Yes."

(d) The San Pedro, Los Angeles and Salt Lake Railroad Company operating since 1905.

The Union Pacific acquired one-half of the stock of this company before it began operation, which it did in the year 1905 (*United States* v. *Union Pacific R. Co.*, (1911) 188 Fed. 102, 108).

JOHN A. MUNROE, Vice-president and Traffic Manager of the Union Pacific Railroad Company, testified (I R. 386):

"Q. Since the establishment of the San Pedro line in 1905 that has been the Union Pacific's preferential route on southern California business, has it not?

A. It has."

(e) Western Pacific Railway Company operating since July 20, 1910.

The line of this company, commonly called a Gould company, from its junction at Salt Lake City with the Denver and Rio Grande to San Francisco Bay, was opened July 20, 1910 (Sproule, I R. 225).

(f) Electric lines in California constructed since 1901.

Speaking of the Atchison, Topeka and Santa Fe, Mr. Chambers testified (III R. 974):

"We have connections independent of the Southern Pacific in northern California. We have the Central California Traction Company, running from Stockton to Sacramento; we have the Oakland & Antioch Electric line running from Oakland to Sacramento, crossing the river near Bay Point; we have the Northern Electric Railroad running north from Sacramento, that connects with the Central California Traction Company at Sacramento."

Again Mr. Chambers said (III R. 983-984):

> "Q. You spoke of using the Northern Electric and the California Transportation Company and the Oakland, Antioch & Eastern as connections. I suppose you mean you have traffic arrangements with those lines for the interchange of freight?
>
> A. Yes; we have joint rates in effect.
>
> Q. You have joint rates in effect, which gives you those lines for purposes of securing freight from the points reached by them?
>
> A. From the points reached by them, and in competition with the Southern Pacific.
>
> Q. In competition with the Southern Pacific?
>
> A. Yes; as to points reached by the Southern Pacific and the electric lines."

Mr. Spence testified (III R. 1024-1025) that the following "electric lines were opened in California, the Central California Traction Company between Stockton and Sacramento, the Northern Electric between Sacramento and Marysville and Chico, and the Oakland, Antioch & Eastern between Sacramento and Oakland."

We have now dealt with the principal radical changes in traffic conditions since 1901. It will be appropriate to sum up with the testimony of Judge Lovett and Mr. Spence, which deals with these changes in a connected way.

Judge Lovett testified (I R. 295-296):

> "Q. (By Mr. Orr.) You may state what in your opinion, from your knowledge of the situation, would be the effect upon the competitive power of the Union Pacific Railroad Company in competing for transcontinental business or other business reaching in the territory served if there was a separation, if the Central Pacific Railway Company were separated from the control of the Southern Pacific Company?
>
> A. The Union Pacific now is merely a connection of the Southern Pacific Company at Ogden, and is not as dependent on the Southern Pacific Company as it formerly was for the business it gets; but the Southern Pacific Company is in the position, by reason of its ownership of the Central Pacific, to divert a great deal

of business from there to the Union Pacific. If the Union Pacific had its own line into Central California it would not be dependent on any other line but would have its own line to come directly in contact with the shippers. I am not prepared to say, however, that we would get any more business then than we get now.

Q. You say the Union Pacific is not as dependent now as it formerly was; why not?

A. Well, perhaps I could do better by contrasting the situation now with what it was when the Union Pacific acquired control of the Southern Pacific. At that time the shipper had no right to route his traffic. That was in the hands of the carrier. There was only one railroad between Ogden or Utah and California. That was in 1901. The Union Pacific was absolutely dependent on the Southern Pacific for its California business. It had no line of its own, and there was no other line. Since 1901 what is commonly referred to as the Clark road has been constructed between Salt Lake City and Los Angeles and San Pedro. The Union Pacific has a half interest and equal voice in the management of that line. That was open for business in 1905. That affords the Union Pacific an entrance into the State of California where it is a competitor with the Southern Pacific Company. The Western Pacific Line has been opened from Salt Lake City to central California; that is, to Sacramento, Stockton, Oakland and San Francisco and some other points, and the Union Pacific, or the Short Line, connects with it at Salt Lake City, and, while I do not want to throw stones at it, it is not as good as railroad as the Central Pacific in any respect.

Mr. Herrin: Which road is that?

The Witness: The Western Pacific. That has been opened, it is a railroad and it is there, but it was not there in 1901. So, with those considerations, the building of the line from Salt Lake City to Los Angeles, opened for business in 1905, the passage of the Hepburn Act in 1906, which gave the shipper the right to route his freight, and the opening of the Western Pacific, the Union Pacific is not dependent to the same extent now as it was formerly on the Central Pacific; but the Central Pacific is far and away the best connection for the Union Pacific to Central California. It is the shortest line and the best railroad in every sense of the word."

Mr. Spence testified (IV R. 1046-1047):

"Q. Mr. Spence, state whether or not the Union Pacific is more or less at the mercy of the Southern Pacific now than it was just before the merger in 1901, in respect to securing good service, reasonable terms and facilities, and so forth, for engaging in transcontinental business via the Ogden route; and give the facts upon which your answer is based.

A. Prior to 1901 the Union Pacific had, beside the Southern Pacific west of Ogden as a connecting line, its rail route to Portland and its steamship line to San Francisco as its only alternative route. Since that time the Western Pacific and the San Pedro, Los Angeles & Salt Lake railways have been constructed, affording the Union Pacific various routes; the Interstate Commerce Law was amended in 1906, delegating authority to the Interstate Commerce Commission to establish through routes and joint rates, which gives the Union Pacific an absolute guaranty of the continuation of through routes and joint rates; in 1910 the Commission was given authority to suspend advanced rates; and by the same amendment to the law the shipper was given authority to route his freight, and the carriers were required to respect his routing.

Q. What kind of service is maintained by the Southern Pacific over its end of the Ogden route; that is, between Ogden and San Francisco? I mean in respect of the maintenance of the road as well as in respect of the equipment and all the elements that go into service?

A. The service on the line west of Ogden is not excelled anywhere, under like conditions.

Q. What do you mean by 'under like conditions'?

A. The character of the country, the density of the traffic, and the population.

Q. State any facts that you may know tending to show whether the Southern Pacific Company has any interest or motive to impair this service over the Ogden route.

A. In the first place, the Southern Pacific Company has a very large investment in the Central Pacific, upon which it is anxious to earn a return. In the second place——

Q. Just give the general character of that investment, without going much into detail.

A. It owns the stock, and is the guarantor of the bonds.

In the second place, the Southern Pacific is dependent upon the Central Pacific, west of Ogden, as the only route by which it can successfully compete for the traffic to and from the middle west territory, and also dependent upon that route to successfully compete for a large share of the traffic to and from the Atlantic seaboard territory for which the Sunset-Gulf route is physically unable to compete. These conditions not only afford no motive for impairing the service, but they afford every incentive for keeping the service up to its maximum efficiency.

Q. Could you impair the service on your part of the Ogden route, with a view to benefitting the Sunset-Gulf route in respect to the limited traffic for which those two routes offer alternative routes, without at the same time impairing the service and injuring the Ogden route in respect to this traffic as to which the two lines do not offer alternative routes?

A. No."

(31) THE SOUTHERN CONSTRUCTION (YUMA-EL PASO-NEW ORLEANS) AS A NORMAL AND NATURAL GROWTH.

After the building of the Central Pacific, the natural development of railroad building in and from California called for feeders in California and thereafter for a line through El Paso to New Orleans.

Mr. Chambers testified (III R. 939-941):

"Q. After the building of the Central Pacific main line connecting from San Francisco to Ogden, what would naturally be the next step in railroad development or construction to be taken, concerning that line?

A. Building feeders for that line through the valleys of northern California.

Q. What, if any, lines southerly from the Central Pacific main line would you regard as feeders?

A. The line south through the San Joaquin Valley, through to Los Angeles, connecting northern and southern California.

Q. How far north would you go for these lines as feeders?

A. The line that is south into the Salinas Valley, and north of Sacramento into the Sacramento Valley.

Q. How far north would the line be constructed as a feeder, naturally, from Sacramento?

A. As a feeder, up to the Oregon line.

Q. You will remember, as a matter of railroad history, if you do not know personally, that when the Central Pacific main line was opened in 1869 there was no other transcontinental rail line, and that the first transcontinental line other than the Central Pacific was formed by the junction of the Santa Fe at Deming, New Mexico, with the Southern Pacific, in 1881.

What would you say as to the construction of the line southerly from Los Angeles to Deming, which was constructed, as to whether that would be a natural, congruous, development of railroad building, as a part of this system, of which the Central Pacific main line was a nucleus in the beginning?

A. I think that would be the natural and business-like move to make, to extend the line from southern California eastward through Arizona.

Q. The Texas Pacific line—you know the location of that, do you?

A. Yes.

Q. Extending from Sierra Blanca on the Southern Pacific line eastward to what point?

A. To Texarkana, Arkansas.

Q. Now, I will remind you, as a historical fact, that the junction of the Central Pacific was made with the Southern Pacific line at Sierra Blanca in 1882. What would you say as to the extension of the Southern Pacific line eastwardly from Sierra Blanca upon the route it was built upon, to Houston, forming connection with the lines built between Houston and New Orleans?

A. I would say that at that time the natural thing to do and the business thing for the Southern Pacific to do, was to get a through line between California and New York, and the extension of their line eastward was the desirable thing to do.

Q. Eastward to what point?

A. Well, to New Orleans. New Orleans is where they first extended it to.

Q. To some point on the Gulf of Mexico?

A. Yes.

Q. Did the business needs of that country which is served by that line—which, of course, includes California, the local territory, and whatever traffic might be gained on that line—did those business needs justify the construction of that line at that time?

A. They did. At that time and for some years afterwards the Atlantic seaboard territory supplied the manufactured merchandise for the entire Pacific Coast, and took all the Pacific Coast products—the great bulk of them; perhaps seventy-five to eighty per cent of them.

Q. Was there any other line that could have been built at that time, first, after the construction of the Central Pacific, which would have been more practicable or a better line for railroad purposes, or for the service of the public, than the Southern Pacific line from Goshen to New Orleans?

A. I think that was the best line that the Southern Pacific could build to serve all their purposes; of course any through line would have been beneficial.

Q. You spoke of the purposes of the Southern Pacific. My question called for your consideration of the service to the public also. Do you include that?

A. That would include the service to the public."

Mr. Kruttschnitt testified (II R. 727-728):

"Q. Mr. Kruttschnitt, from your general knowledge and experience as a railroad expert, and from your particular knowledge of the lines composing the Southern Pacific system, how would you characterize the growth and development of the Southern Pacific system?

A. I think I have already characterized it as being a normal and gradual growth, to meet the necessities of the territories served by these lines.

Q. Has it the characteristic of system growth?

A. Absolutely."

(32) THE SO-CALLED EUROPEAN OR FRENCH LOAN OF FR. 250,000,000 OR £9,875,000, OF MARCH 1, 1911.

It became necessary in 1911 for the Central Pacific Railway Company to borrow in Europe the above-mentioned amount, and it, therefore, issued its 4% bonds in the amount stated,

payable March 1, 1946. These bonds were unconditionally guaranteed by the Southern Pacific Company and were secured by stocks owned by that company (D. Ex. 29, V R. 1870). The deed of trust, among other things, provides that if the 99-year lease of the Central Pacific lines to the Southern Pacific is terminated the bonds shall be immediately due and terminable (V R. 1884-1885).

The Southern Pacific guaranteed these bonds and furnished the security for them in the assurance, of course, that it had a valid lease of the properties, and was the owner of all the stock of the Central Pacific Railway Company.

This European or French loan became an important item in the negotiations for the purchase of the Central Pacific by the Union Pacific in 1913, Mr. Kruttschnitt testifying (II R. 756-757):

> "Q. What were the undertakings generally of the Union Pacific with reference to this European loan?
>
> A. The European loan was handled by a syndicate of French banks, and they undertook to get the consent of those bankers to a substitution of collateral by the Union Pacific to take the place of the Southern Pacific collateral, and also to get them to agree to the abrogation of the Central Pacific lease by the Southern Pacific Company. They failed in getting their consent to the abrogation of the lease, and then the other followed, that under certain conditions they would furnish collateral in lieu of what we would put up.
>
> Q. It was a condition of that European loan that the bonds would fall due, and could be called, if you parted with the Central Pacific Railway Company, was it not?
>
> A. If we either broke the lease or parted with the stock.
>
> Q. And one of the agreements of the Union Pacific was that it would try to get the French banks to waive that?
>
> A. Yes.
>
> Q. Do you know whether they succeeded?
>
> A. No, they did not; they failed."

In respect of this loan Mr. Kruttschnitt testified (II R. 758-759):

> "Q. Have you ever calculated what would be the financial loss to the Southern Pacific Company if that

loan was called by reason of a violation of the condition that the Southern Pacific Company should maintain its lease of the Central Pacific Railway Company and its ownership of the Central Pacific Railway stock?

A. I did, some time ago; I asked the comptroller for the cost of that money at maturity of the bonds, and the cost at the present time, in case the loan were called, because we wanted to do something that was forbidden by the agreement, and I wanted to see what the consequences would be.

Q. Just state, generally.

A. The money will cost us, when the loan matures, 5.2 per cent. If the loan were called now, in 1915, it would cost us 8.2. That is, it would cost us three per cent. per annum for four years that it has been alive, on roughly, $50,000,000, or about $6,000,000 if the loan were called.

Then, if we had to borrow this money again in the open market, we are told by banker friends that it would probably cost us at least one per cent. more than the original cost; in other words, the cost at the present time, with discounts, commissions and expenses, would be about 6.2 per cent. Therefore, for thirty-five years less four; that is, thirty-one years, we would have to pay annually one per cent. more on $50,000,000. One per cent. on that is $500,000, or $15,500,000 in the next thirty-one years.

Q. That would be a loss suffered by the Southern Pacific Company?

A. Yes, through a call of that loan, plus the six million."

Upon cross-examination, the Government put a number of questions to Mr. Kruttschnitt with the object of showing that the loss would fall not upon the Southern Pacific but upon the Central Pacific (II R. 822-823). In any event, however, the loss would fall upon one, the Southern Pacific eventually.

(33) THE ABSENCE OF ATTEMPTS AT MONOPOLY AND MONOPOLISTIC PRACTICES.

In the petition it is alleged that the defendants are "attempting to monopolize and are monopolizing trade and commerce." No evidence whatever was offered to support this allegation, and we presume that this claim will not be pressed upon the hearing. We shall not, therefore, stop to consider this matter at all but, in passing, we may refer to the testimony of Mr. Spence (III R. 1039) where mention is made of forty-six soliciting agencies in California, representing all the transcontinental lines, and fifty-nine soliciting agencies on the Atlantic seaboard, representing the same lines—a situation which precludes any thought of monopoly.

(34) THE IMPOSSIBILITY OF DISMEMBERMENT OF THE SOUTHERN PACIFIC-CENTRAL PACIFIC SYSTEM WITHOUT SUBSTANTIAL DETERIORATION IN THE PUBLIC SERVICE.

If the question of *undue* restraint of trade should ever become vital to a decision of the case it would be all-important to consider the consequences of dismemberment of the system, for by focussing attention upon such consequences we would be better able to know what service is achieved by the unified operation of this system, conceived and constructed and always managed as a single property.

The impossibility of a dismemberment that would preserve the present efficient public service furnished by the system has been exemplified by the failure in 1913 to effect such a dismemberment. The attempt failed because it fell foul of public interests. The Union Pacific, of course, desired to acquire the Central Pacific *upon terms,* and the Southern Pacific, under compulsion, agreed to sell, fearing later it might be forced to sell without having at hand a buyer whom the Attorney-General would be in a position to coerce into approximately acceptable

terms. The case presented, therefore, was that of two contracting corporations who were very eager to reach an agreement, although under coercion. There was no captious bargaining, and there was every desire and genuine effort on the part of the contracting corporations to work out an agreement. It is true that each one of them insisted upon terms collateral to the agreed purchase and sale of the Central Pacific, because such collateral agreements were necessary to the very life of their bargain.

The Union Pacific refused to buy unless it could have (*a*) joint and exclusive use, practically part proprietorship, of the Southern Pacific lines from Sacramento via Benicia to Oakland and San Francisco, and (*b*) the trackage rights from Redwood to San Francisco for its through freight trains. These were essential to any plan which contemplated the taking over of the Central Pacific at an adequate price.

The Southern Pacific on the other hand, would be denied all access to Oregon if it did not acquire all Central Pacific trackage north of Tehama. It, therefore, could not afford to sell upon any terms which did not involve collateral agreements.

The case broke down because the Railroad Commission of California would not permit the Union Pacific to buy a preferential interest in Southern Pacific properties except upon terms which would open these properties to all other competitors in like position, a condition which would have been intolerable to the Southern Pacific and entirely distasteful and disadvantageous to the Union Pacific.

The Railroad Commission of California said (Decision No. 477, rendered February 24, 1913, D. Ex. 25, pp. 12 and 13):

> "We are not unmindful of the fact that, as testified by both Judge Lovett and Mr. Sproule, these companies are more or less under duress to contract. On the one hand the stock of the Southern Pacific owned by the Union Pacific is in the hands of the court for sale, and if an arrangement is not consummated before ninety days shall have elapsed after the decision of the court, this stock is to be placed in the hands of a receiver to be sold as the court directs. It is testified that the Attorney General is threatening proceedings against the Southern Pacific if it does not divest itself of con-

> trol of its alleged competing line, the Central Pacific, and we appreciate the desire of the parties to bring about a solution of their troubles which will result in as little financial loss to them as possible, yet we believe it is our duty to have in mind the effect of any arrangement which may be designed upon not only the contracting parties here, but the public. As we have already indicated, we do not believe the sale of the stock of the Central Pacific is necessary to bring about the result desired by the Supreme Court, or even by the Attorney General, but if Federal authorities acting within their jurisdiction in this matter, which is wholly without our jurisdiction, shall decide that the sale of this stock must be made, then we do not feel that it will be possible for us to protect the public beyond that protection which may be accorded by the imposition of conditions specified in the order herein."

It appears from this that the difficulties of dismemberment, consistent with public interests, are well-nigh insurmountable. This is abundantly shown by the uncontradicted testimony of the witnesses.

JOHN M. ESHLEMAN, Lieutenant-Governor of California, and for four years President of the Railroad Commission of California, and the author of the decisions in the matter of the attempts of the Union Pacific to buy the Central Pacific from the Southern Pacific (D. Exs. 25, 26), testified that the effect of the separation would be to create a system in California less convenient and more expensive than the present system (III R. 877); that by destroying the present unity California would be broken up into two-line and three-line operation, and that he knows no other better method by which service as good as at present could be obtained (III R. 882-883); that if dismemberment occurred each road would have to provide terminals and duplicate investments (III R. 885). In fact, his testimony is to the same effect as his opinion (Decision No. 477, D. Ex. 25, p. 9):

> "We do not pretend to say, nor do we consider it necessary to decide, how serious an impairment of the

> Southern Pacific will be brought about by the securing of the Central Pacific main line and feeders by the Union Pacific, but we are of the opinion that the present commanding position of that road cannot be maintained under the contract which is presented to us for approval, and that there is room for grave fear that if the agreement is carried out this State will, instead of securing two strong competing lines, secure one dominant line and one much impaired line."

R. N. Lynch, Vice-President of the San Francisco Chamber of Commerce, testified that great disadvantage would be suffered by shippers if separation were accomplished (II R. 834); that most of the members of the Chamber of Commerce were large shippers and that their attitude in this regard was unanimous; that they heeded the warning of the Railroad Commission of California that double cost of operation would inevitably cause a raising of the rates (II R. 835), and that although the sentiment of the Chamber of Commerce had favored the Union Pacific unmerger it was decidedly antagonistic to the present proposed dismemberment (II R. 863-864). Defendants' Exhibit No. 22, the resolution of the Chamber of Commerce endorsing the decision of the Railroad Commission of California against unmerging, was introduced with Mr. Lynch's testimony, and strongly expresses the opinion that the preservation of the *status quo* in California is of great importance to shippers, and to the State.

Edward Chambers, Vice-President of the Atchison, Topeka and Sante Fe Railroad Company, explained how the separation of the Central Pacific from the Southern Pacific would tend to increase rates and would necessarily increase local rates because of the substitution of a two-line haul for the existing single line (III R. 947). He also explained how separation, although not increasing competition to any extent, would seriously impair both the freight and passenger service; and he added that traffic arrangements cannot possibly obviate all the disadvantages of separate ownership. Again (III R. 982), he emphasized the inadequacy of joint arrangements to compen-

sate for loss after separation and to maintain the present service. He testified further that separation would disarrange the train service; that in the San Joaquin Valley the through service would be displaced by local service and that freight now moving over the Central Pacific lines in the interior valleys, from northern to southern California, would, after separation, have to be sent by way of Port Costa (III R. 986, 989). We may append here his significant remark (III R. 971) that from the Atchison point of view he would prefer to compete against the Central Pacific and Southern Pacific as two separate lines, implying that separation would lessen competition instead of increasing it.

Mr. Kruttschnitt recited in detail the results which would follow dismemberment (II R. 742-751, 799) and estimated that the expense to the Southern Pacific of separation and duplication of terminals would amount to $85,714,000. He testified also that the standard of efficiency would be irreparably lowered by separation (II R. 800).

Judge Lovett said that the Central Pacific separated would be in the position of the Western Pacific; that is to say, it would have to do a great deal of building to supplement the present line and provide feeders for it (I R. 302).

Mr. Sproule remarked (I R. 241) that a forced sale of the Central Pacific to a road other than the Southern Pacific would be an amputation tantamount to a capital operation in respect to the two lines. He testified further (I R. 252) that there is no particular respect in which the public would be advantaged by separation; that on the contrary, it would suffer with the Southern Pacific in the distinct disadvantages to the company consequent upon the dismemberment of the Southern Pacific system.

Mr. Spence outlined the disastrous consequences of dismemberment (III R. 1175), and said that the separation of the Southern Pacific-Central Pacific system would effect no change in transcontinental rates but, on the other hand, would increase local rates (III R. 1068-1069), and he added that separation would impair service.

In addition to all this testimony, which had to do principally with California, it is to be recalled that dismemberment would have disadvantageous results in respect of traffic (*a*) between California and Oregon; (*b*) between California and Arizona, and (*c*) between Oregon and California on the one hand and Nevada on the other. Indeed, it is quite likely that the dismemberment of the system would be very disadvantageous to Nevada, even in respect of westbound traffic, and this view is suggested in the remarks of Senator Newlands of Nevada on June 18, 1913 (50 Congressional Record 2372), as follows:

> "Mr. President, so far as I am concerned, I have always thought that it would be to the advantage of my State if the Central Pacific Railroad were joined to the Union Pacific Railroad, thus constituting a through line from the Missouri to the Pacific. . . .
>
> I must confess that recently my view as to where the Central Pacific system should be placed in this readjustment of lines has been somewhat affected by the approaching completion of the Panama Canal. The Panama Canal will make San Francisco the great distributing point of the western coast, and it is a question whether the interest of Nevada does not lie rather in maintaining the Central Pacific system as a part of the Southern Pacific system, thus giving that system a radical distribution toward the east from San Francisco, rather than in connecting it with the Union Pacific system, which involves absentee control far off in New York instead of practical home rule through the Southern Pacific system, which has its home office at San Francisco."

In addition to all these considerations, reference should be made to the three competing branches from Utah, say, to the Coast, which the Union Pacific would own if it were to acquire the Central Pacific. (See Map XIV in the Appendix.) The Union Pacific would then be (*a*) the owner of the Oregon Short Line from Granger to Portland, of which it is said in the *Union Pacific Case,* 226 U. S., foot page 89, "the Portland route was a

factor in ratemaking to the Coast", (*b*) the half owner of the Salt Lake-Los Angeles route, which Judge Lovett (I R. 296) calls a competitor with the Southern Pacific Company, *i. e.,* the Central Pacific line; and lastly, (*c*) the owner, in the case supposed, of the Central Pacific line. As a result, the Union Pacific, as Mr. Kruttschnitt said, would then be "in absolute control of the Pacific Coast business". If dismemberment were decreed the last condition of the public would be worse than the first.

(35) MILEAGE OF LINES OWNED BY SOUTHERN PACIFIC AND PROPRIETARY COMPANIES, AND DETAILED TABLE OF MILEAGE OF CENTRAL PACIFIC LINES.

(a) Mileage of lines owned by Southern Pacific and proprietary companies (June 30, 1915):

First Main Track	10,560.08
Conditional Main Track	530.88
Sidings	3,859.52
Ferries	17.90
Water Lines	4,873.
	19,841.38

(b) Detailed mileage table of Central Pacific lines:

	First Main Track.	Add'l Main Track.	Sidings.
CENTRAL PACIFIC RAILWAY:			
Main Lines:			
Oakland Pier to West Oakland, Cal.	1.01	1.01	
Oakland Pier to Elvas, Cal.	133.46	35.86	
Sacramento, Cal., to Cecil Junction, Utah	692.05	196.98	
Roseville, Cal., to Oregon State Line	296.59		
Niles to San Jose, Cal.	17.58		
Niles Junction to Redwood Junction, Cal.	16.24		
Lathrop to Goshen Junction, Cal.	146.45	4.62	
Branches:			
Oakland Pier to West Oakland, Cal.	1.01	1.01	
Oakland Pier to Dutton ave., Oakland, Cal.	11.99	11.99	
Oakland, Antonio Junc., to Fruitvale, Cal.	4.83	4.49	
Elmhurst to Stonehurst, Cal.	.75	.73	
Halvern to Alvarado, Cal.	2.63		
Sacramento to Walnut Grove, Cal.	24.30		
Barber to Stirling City, Cal.	30.57		
Fernley, Nev., to Westwood, Cal.	136.57		
Hazen to Fallon, Nev.	15.92		
Hazen, Nev., to Keeler, Cal.	288.65		
Churchill to Mound House, Nev.	26.27		
Fulben to Candelaria, Nev.	5.51		
Tulasco to Metropolis, Nev.	7.89		
Umbria Junc., Nev., to near Ogden, Utah	142.48		
Weed, Cal., to Kirk, Ore.	126.49		
Natron to Oakridge, Ore.	34.39		
Mojave to Owenyo, Cal.	142.90		
San Francisco to Oakland Pier (Ferry 3.50 miles)			
San Francisco to Broadway, Oakland (Ferry 6.40 miles)			
San Francisco to Sacramento (River line 125 miles)			
	2,306.53	256.69	943.76
Owned jointly with:			
Denver and Rio Grande R. R. Co.:			
In Ogden yard	—	—	.36
Leased from:			
Southern Pacific Co.:			
Alameda—Lincoln Junc. to High st.	1.43	1.43	.08
Alameda—Pacific Junc. to Encinal Junc.	1.47	1.12	.04
Union Pacific Railroad Co.:			
5 miles west of Ogden.	4.53	.15	.63
Oregon Short Line R. R. Co.:			
Corinne Junc. to Brigham, Utah	3.98		
Ogden Union Ry. & Depot Co.:			
Trackage rights through terminal grounds	.81		
	12.22	2.70	1.11
	2,318.75	259.39	944.87
Less leased to:			
Butte County R. R. Co.:			
Barber to Stirling City, Cal.	30.57	—	2.91
Oregon Short Line R. R. Co.:			
Sidings in Ogden Yard	—	—	15.68
South Pacific Coast Ry. Co.:			
At West Alameda	—	—	2.54
Southern Pacific R. R. Co.:			
Sacramento to Walnut Grove, Cal.	24.30	—	8.62
Fresno to Goshen Junction, Cal.	33.58	3.35	44.92
	88.45	3.35	74.67
	2,230.30	256.04	870.20
Operated jointly with:	5.38	—	—
Southern R. R. Co.:			
Brighton to Sacramento, Cal.	2,235.68	256.04	870.20

(36) SEVERAL SUBSIDIARY MATTERS MAY BE HERE NOTED TO FACILITATE AN UNDERSTANDING OF THE CASE.

(A) United States v. Southern Pacific Co., United States Circuit Court, Southern District of California, commenced July 16, 1894, dismissed August 4, 1894.

While the railroad strike of 1894 was at its height, the Government filed a bill against the Southern Pacific Company, Central Pacific Railroad Company, and all the other corporations whose lines now comprise the Southern Pacific-Central Pacific system, to dissolve, on the ground that their unified operation constituted a monopolization of trade. The record in the case is Defendants' Exhibit 96. The bill was filed July 16, 1894, and nineteen days later, August 4, 1894, it was dismissed by direction of the Attorney-General. In the bill a decree was prayed, among other things for the annulment of the leases of the Southern Pacific Railroad Company and the Central Pacific Railroad Company to the Southern Pacific Company, dated February 10, 1885, and February 17, 1885, respectively.

In *United States* v. *Debs,* (1894) 64 Fed. 724, it will be seen that the suit there brought was commenced July 2, 1894, and the injunction violated by Debs and others, from that date on, resulted in proceedings in contempt, which were filed July 17, 1894 (64 Fed., top p. 726).

(B) A brief reference to the history of the more important corporations which figure in the case.

In examining the record it may be found convenient to have a brief summary of the corporate history to which easy reference may be made.

1. Central Pacific Railroad Company of California was incorporated as a California corporation June 28, 1861. By two consolidations, June 23, 1870, and August 22, 1870, it

absorbed a number of other California railroad corporations, including the Western Pacific Railroad Company and the California and Oregon Railroad Company. The Central Pacific Railroad Company (the name assumed after the consolidation of 1870) continued as the owner of the Central Pacific lines until July 29, 1899, when, in the reorganization occasioned by the settlement with the Government, it transferred all its properties to the Central Pacific Railway Company, a Utah corporation.

2. Central Pacific Railway Company was organized in Utah by articles dated July 26, 1899, and filed July 29, 1899, on which day the (old) Central Pacific Railroad Company conveyed to it all its assets. Since then the (new) Central Pacific Railway Company has been the owner of the Central Pacific lines. This is the company that is one of the defendants in the case.

3. Southern Pacific Railroad Company was organized as a California corporation December 2, 1865, and is still in existence. By consolidations under the laws of California this company on October 12, 1870, August 19, 1873, December 18, 1874, May 14, 1888, and April 14, 1898, absorbed a number of other railroad corporations. By further consolidation under the laws of the State of California it absorbed Southern Pacific Railroad Company of Arizona and Southern Pacific Railroad Company of New Mexico on March 10, 1902.

4. Southern Pacific Railroad Company of Arizona was incorporated under the laws of Arizona September 20, 1878, and built the Arizona section of the Sunset-Gulf line. It was absorbed by the Southern Pacific Railroad Company, a California corporation, by the articles of consolidation of March 10, 1902.

5. Southern Pacific Railroad Company of New Mexico was incorporated under the laws of New Mexico April 14, 1879, and

built the New Mexico section of the Sunset-Gulf line. It was absorbed by the Southern Pacific Railroad Company, a California corporation, by the articles of consolidation of March 10, 1902.

6. Southern Pacific Company was incorporated under the laws of Kentucky (Acts Ky. 1883-4, Vol. I, p. 725) March 17, 1884, and thereafter became the owner of the entire capital stock of the three companies known as the Southern Pacific Railroad Company organized under the laws of California, Arizona and New Mexico, also of all the capital stock of the two Texas and two Louisiana corporations whose lines go to make up the Sunset-Gulf route. In 1899, or thereabouts, it became the owner of all the common and preferred stock of the (new) Central Pacific Railway Company (Kruttschnitt, II R. 734).

7. Western Pacific Railway Company was organized under the laws of the State of California, March 16, 1903, as a part of the Gould system. This company is not to be confounded with the Western Pacific Railroad Company which was absorbed by the (old) Central Pacific Railroad Company in the consolidation of June 23, 1870.

(C) The construction by the Southern Pacific Company of (1) the Coast Line from San Francisco to Los Angeles, and (2) the line through the west side of the San Joaquin Valley.

Two important pieces of construction by the Southern Pacific Company are frequently mentioned, and for convenient reference, we note them here.

1. The Coast Line from San Francisco to Los Angeles was opened in 1901. Portions of this line had been constructed for many years before that time, but the last gap was not closed until 1901.

The construction is shown by the following table:

San Francisco	to	Menlo Park	Oct. 17, 1863
Menlo Park	"	San Jose	Jan. 16, 1864
San Jose	"	Gilroy	Mar. 13, 1869
Gilroy	"	Pajaro	Nov. 27, 1871
Pajaro	"	Salinas	Nov. 1, 1872
Salinas	"	Soledad	Aug. 12, 1873
Soledad	"	Templeton	Nov. 16, 1886
Templeton	"	Santa Margarita	Jan. 13, 1889
Santa Margarita	"	San Luis Obispo	May 5, 1894
San Luis Obispo	"	Guadalupe	July 1, 1895
Guadalupe	"	Lake	Dec. 31, 1895
Lake	"	Surf	Aug. 18, 1896
Surf	"	Honda	During 1898-99
Honda	"	Cuate Canon	During 1899-00
Saugus	"	Ellwood	Dec. 21, 1887
Completion of gap between Ellwood and Cuate Canon, thus opening Coast Line			March 1901

2. The construction from Oakland to a point on the Southern Pacific line below Goshen, by which that company was enabled to travel over its own rails from Oakland to Los Angeles via the San Joaquin Valley, and which is known as the West Side line in the San Joaquin Valley, was completed in 1891.

A table showing this construction follows:

West Oakland	to	Shellmound	August 16, 1876.
Shellmound	to	Martinez	January 9, 1878.
Martinez	to	Tracy	September 3, 1878.
Tracy	to	Newman	July 1, 1888.
Newman	to	Los Banos	November 1, 1889.
Los Banos	to	Armona	August 28, 1891.
		(thence via Alcalde-Goshen line to Goshen, and via main line to Los Angeles).	

The present West Side line was opened July 1, 1892, when the Kerman-Fresno section was completed.

(D) The gradual decline in the importance of the Sunset-Gulf route since 1897.

In the early years of its existence, the Sunset-Gulf route was able to command a large portion of the Atlantic seaboard traffic because it was able to give shippers more satisfactory service than was afforded to them by the all-rail routes. It may be said that during the first fourteen years of its existence (until 1897) it had a preponderance of such traffic, although before the year last named its traffic commenced to decline. Since 1897 there has been a gradual falling off in its takings, and its importance has decreased.

Mr. Spence, in speaking of the early history of the Sunset-Gulf route, said that it attracted a great deal of traffic from the sailing vessels and afforded facilities for marketing traffic which had not before existed; that it had the effect, too, of expediting the movement of traffic which had been delayed on the congested lines east of Ogden (III R. 1175-1176).

He also testified that it was difficult to fix the date when the ascendancy of the Sunset-Gulf route came to an end because the change was a gradual process; that the all-rail lines gradually improved their service and co-ordinated their efforts; that their number had been gradually increasing with a corresponding increase in the army of soliciting forces, as the all-rail lines approached the standard of the Sunset-Gulf route; that the Sunset-Gulf route handled the major part of the traffic until about 1885; that by 1897 the all-rail lines had secured a preponderance of the business; that from the period of its ascendancy until the present time the Sunset-Gulf route has applied a "continuous competitive spur to the all-rail lines" (III R. 1029).

He further testified that the decline in the Sunset-Gulf route's business is an absolute decline in tonnage, and that at present the tonnage is very substantially below its maximum; that the falling off is due in part to the opening of the Panama Canal but that a decrease of thousands of tons had

been recorded long before the opening of the Canal (III R. 1124).

Mr. Schumacher gives as one reason for the Sunset-Gulf route's early prominence, the local organization of the Southern Pacific in San Francisco, enabling the company to "do a great many things locally for shippers that a foreign line could not do; I mean legitimate things. Their service was better" (I R. 149). He testified that in the eighties, about ninety per cent. of the New York-San Francisco business moved over the Sunset-Gulf route; that now it is scarcely fifty per cent. (I R. 155); and that the Sunset-Gulf route is less strong in influence now than it has been at any time (I R. 169).

Mr. Chambers testified that at first the Sunset's unified management gave the best service but that later a division of traffic ensued when the all-rail lines were improved (III R. 942-943). He further testified (III R. 958) that after the reorganization of the Atchison line in 1895 a marked improvement was made in the conduct of the line, and he adds (III R. 959) that then the Santa Fe was the only line which could really compete with the Sunset-Gulf route.

(E) The death of Mark Hopkins, Charles Crocker, Leland Stanford and C. P. Huntington.

Mark Hopkins died in 1878, Charles Crocker in 1888, Leland Stanford in 1893, C. P. Huntington in 1900.

(F) Fires which prevented the production by the defendants of several records in the case.

The Southern Pacific Company's offices in San Francisco were burned in the fire of April 18, 1906. Other records were lost in the Equitable fire in New York January 8, 1912; and two fires at the Southern Pacific Pier in New York, one in 1907 and the other in 1910, also destroyed their records (Van Deventer, III R. 905).

(G) The witnesses for the Government.

It is worthy of note that no shipper has appeared in the case to complain of the treatment of himself or of shippers generally, and in this respect, not to mention others, the case is unique.

That the case is purely theoretical and not a practical one, is well shown by the list of witnesses called by the Government:

JOHN MUIR, Traffic Superintendent of Northern Pacific Railroad Company.

HUGH NEILL, Secretary of Southern Pacific Company.

JAMES C. LINCOLN, Manager of Traffic Bureau of Merchants Association of New York.

FRANK H. DAVIS, Assistant Treasurer of Southern Pacific Company in 1901.

THOMAS H. ROSSBOTTOM, Secretary of Panama Railroad Company.

EDWIN S. ALLEN, Vice-President of National Railway Publication Company.

THOMAS M. SCHUMACHER, Chairman of the Chicago, Rock Island and Pacific Railway Board, and previously in the employ of the Union Pacific Railroad Company for a number of years.

WILLIAM SPROULE, President of the Southern Pacific Company.

HENRY RUHLANDER, a member of the firm of Speyer & Company.

OSCAR L. COLES, Transfer Clerk, Central Trust Company.

ANGUS D. MCDONALD, Comptroller of Southern Pacific Company.

ARTHUR A. TOPPING, Clerk Interstate Commerce Commission.

ROBERT S. LOVETT, Chairman of Executive Committee of Union Pacific Railroad Company.

JOHN B. DE FRIEST, General Eastern Agent of Union Pacific Railroad Company.

RALPH MILLER JOHNSON, General Eastern Agent of Chicago and Northwestern.

WILLIAM W. HALL, General Agent of Chicago, Milwaukee and St. Paul.

BENJAMIN T. BOOZE, Chief Clerk of Transcontinental Freight Bureau.

WILLIAM H. CONNOR, General Agent Union Pacific Railroad Company in Cincinnati.

JOHN A. MUNROE, Vice-President and Traffic Manager, Union Pacific Railroad Company.

(37) CONCLUSION.

The foregoing Statement of the Case is sufficient to bring out *our case,* as contradistinguished *from our reply to the Government's case.* We have thought that a full understanding of the case would be better arrived at if we dealt in our Statement of the Case principally with those facts which bring out in sharp relief our own case. We shall have occasion in the discussion of the contentions made by the Government to deal with other facts, but those facts are naturally so interwoven with the argument with which they are connected that they may be advantageously omitted from the narrative of the case and reserved for the argument, which follows.

ARGUMENT.

I.

THIS CASE DOES NOT INVOLVE ANY COMBINATION OF COMPETITIVE UNITS, OR ANY COMBINATION AT ALL, FOR THE SOUTHERN PACIFIC AND CENTRAL PACIFIC LINES WERE PROJECTED AND BUILT AND HAVE BEEN OPERATED SINCE THEIR ORIGIN AS ONE PROPERTY.

In the statement of the case (pp. 39-94, *supra*), it appears that the Central Pacific lines and Southern Pacific lines have been operated as one property ever since the commencement of the construction south of Goshen in 1872. In the early days (from 1872 to April 1, 1885), they were operated by the Central Pacific Railroad Company and were known as "Central Pacific and Leased Lines"; on April 1, 1885, they became "Southern Pacific Company and Leased Lines", and later simply "Southern Pacific Company".

It is altogether clear, therefore, that (*supra,* p. 3) :

> "A consideration of the operation of the properties comprising the Southern Pacific-Central Pacific system from the time of their construction—indeed, from the time when the lines were projected—shows that they were built to constitute one system, that in point of fact they were constructed as one system, and that, since their construction, they have always been operated as one system."

It is equally clear that these lines are now operated as they have been operated from the beginning, and that therefore, if they are not now competitive, they never have been competitive. In any event, it cannot be said that they have ever been "combined".

In *United States* v. *Union Pacific* (1912), 226 U. S. 61, a combination is said to be something "whereby natural and *existing* competition in interstate commerce is unduly *restricted* or *suppressed*" (p. 85) ; again, "the *consolidation* of two great competing systems of railroad . . . *creates a combina-*

tion . . . because, in *destroying* or greatly *abridging* the free operation of competition *theretofore existing,* it tends" etc. (p. 88); again, that "it is the scope of such combinations and their power to *suppress* or *stifle* competition" which makes them unlawful (p. 88); and that the Anti-trust law deals with "power *unlawfully obtained*" (p. 96).

It is therefore apparent that this case does not come within any of the definitions of a combination, but, on the contrary, that this suit presents a case of "normal growth", to borrow the language of Judge Hook in *United States* v. *International Harvester Co.* 214 Fed. 987, 1001.

The petition in this case is based upon the idea that prior to 1885 two transcontinental routes were in competition: (*a*) the Central Pacific *with connections to the Atlantic Ocean;* and (*b*) the Southern Pacific Sunset-Gulf route from San Francisco via New Orleans and thence by water to New York, and that the violation of the Anti-trust law arose out of the fact that by the lease of February 17, 1885, that competitive condition had been destroyed. It is true that the petition alleges the acquisition of the stock of the Central Pacific in 1899, but the underlying idea of the petition was that there had been a competitive condition between the two transcontinental routes and that such competitive condition was destroyed in 1885. This is clearly shown by the following extracts from the petition:

> "The lines now owned by the Central Pacific Railway Company, in so far as then existing, were operated prior to 1885 in connection with the lines of the Union Pacific Railroad Company as a continuous connecting route between San Francisco and the Missouri River, with connections eastward to the Atlantic Ocean, and were in competition with the lines now operated by the Southern Pacific Company in interstate and foreign transportation (I R. 8).
>
> "Shortly after the organization of the Central Pacific Railway Company in 1899, and its acquisition of the properties of the Central Pacific Railroad Company, the Southern Pacific Company purchased all of its capital stock, and has since continued to be the owner thereof" (I R. 8-9).
>
> "The Southern Pacific Company acquired the capital stock of the Central Pacific Railway Company and leased

the properties of that company with the purpose and effect of preventing competition between the lines of the said Central Pacific Railway Company and its connections and the lines of the Southern Pacific Company in the transportation of passengers and freight in interstate and foreign commerce" (I R. 9).

"The ownership by the Southern Pacific Company of the capital stock of the Central Pacific Railway Company, and its leases of the properties of that company, and its domination, management, and control thereof, as hereinabove set forth, constitute a combination in restraint of interstate and foreign trade and commerce and a monopolization thereof in violation of the act of July 2, 1890 (26 Stat., 209)" (I R. 9-10).

After the proofs were taken, the Government realized that the Central Pacific and Southern Pacific lines were always operated in the same manner and that it would be impossible, therefore, to establish first that there had been a competitive condition differing from the present condition, and second, that it had been destroyed: consequently, the Government has adopted a different position and in terms claims that the violation of the Anti-trust law consists in having prevented competition from coming into existence rather than in "destroying", "abridging", "suppressing" or "stifling" competition, to employ the terms just quoted from *United States* v. *Union Pacific* (1912), 226 U. S. 61. We shall later take up and consider the contention of the Government that competition has been prevented, but we content ourselves at the moment with the establishment of the proposition with which we are at present concerned; that is to say, that this case does not involve any combination of competitive units, or any combination at all, because the Southern Pacific and Central Pacific lines were projected and built and have been operated since their origin as one property.

II.

AT THE TIME OF THE PASSAGE OF THE ANTI-TRUST LAW (JULY 2, 1890) THE SOUTHERN PACIFIC AND CENTRAL PACIFIC LINES WERE OWNED BY A SINGLE PROPRIETOR, ALTHOUGH THE CENTRAL PACIFIC LINES WERE HELD UNDER A 99-YEAR LEASE MADE FEBRUARY 17, 1885, INSTEAD OF IN FEE; BUT "IT IS OBVIOUS THAT IN PRINCIPLE THE RIGHT OF A LESSEE IS THE SAME AS THAT OF A PURCHASER IN FEE" (224 U. S. 565).

It appears in the statement of the case (pp. 81-2, *supra*) that in 1885 the Southern Pacific Company became the lessee of all the Southern Pacific railroad lines, including the Sunset Gulf Route between San Francisco and New Orleans, and acquired all or substantially all of the stock of the companies owning the said Southern Pacific railroad lines. In the same year the Southern Pacific Company became lessee of the Central Pacific lines for a 99-year term commencing April 1, 1885, by virtue of a lease dated February 17, 1885 (I R. 6, 13).

It is therein provided that

> "The said Central Pacific Railroad Company hereby leases to the said Southern Pacific Company, for the term of ninety-nine years, from the first day of April, A. D., 1885, the whole of its railroad . . . with the right to possess, maintain, use, operate and enjoy the said property and to receive the rents, issues and profits thereof." (I R. 14.)

Again (I R. 18):

> "And it is further agreed between the Southern Pacific Company and the Central Pacific Railroad Company that, upon the execution of this agreement, the said Southern Pacific Company may enter upon, take possession of, and hold during the continuance of this agreement all the property, real and personal, hereby leased by the said Central Pacific Railroad Company to the said Southern Pacific Company."

In 1885, therefore, the Southern Pacific Company became the full proprietor of the Southern Pacific railroad lines and

the proprietor for a term of ninety-nine years of the Central Pacific lines.

In principle the right of a lessee is the same as that of a purchaser in fee. In the early common law an interest for a term of years did not confer an estate in land. But this notion is obsolete, and now a lease has a double aspect; (*a*) it grants a vested estate in respect of the term transferred to the lessee, and (*b*) it is usually executory only in respect of the obligations due from the lessee to the lessor.

In *1 Austin's Jurisprudence,* p. 387, it is said (3rd Am. Ed.):

> "Rights *in rem* sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract. The instrument in those cases wears a double aspect, or has a twofold effect. To one purpose it gives *jus in personam,* in another purpose it gives *jus in rem* and is a conveyance. When a so-called contract passes an estate, or, in the language of the civilians, a right *in rem,* to the obligor, it is to that extent not a contract, but a conveyance; although it may be a contract to some other extent and considered from some other aspect."

24 Halsbury's Laws of England, p. 264, says:

> "At common law an interest for a term of years did not originally confer an estate in the land. Between lessor and lessee there was only a relation of contract, with the result that, if the lessee was evicted, his remedy was to recover compensation from the lessor, and though it was afterwards held that he could recover the land itself, the interest in the land which he thereby acquired was liable to be defeated by a collusive recovery suffered by the lessor. This liability was partially removed by the Statute of Gloucester, and more completely by a later statute. The estate in the land which the termor thenceforward enjoyed is therefore in effect the creation of statute."

In the very early common law the lessee's remedy was a personal one against the lessor, in covenant if he was ejected by the lessor; on a warranty for peaceful possession, perhaps, if he was ejected by a stranger.

The reason why no possessory action was allowed a lessee originally was that such actions were reserved for freeholders; and as the lessee was not a freeholder, he had no possessory action. (*24 Halsbury's Laws of England,* 147.)

Ultimately, however, the law allowed the lessee the legal advantages of possession. This, as stated above, was brought about by the enactment of two statutes passed in 1278 and 1529, each of them designed to protect the lessee in his possession and to prevent a dispossession of the lessee by a feigned recovery suffered by the lessor in an action brought by a third person.

Thus it came to pass that the lessee was given a possessory action theretofore reserved only for the owners of freehold estates, and by being thus confirmed in his possession and the right to recover possession in the event that he was evicted, the lessee came to be regarded as the owner of an interest in the land itself, and the lease as an interest in the land.

The rights of a lessee having been perfected long before the American Colonies were founded, the rights of the lessee and the incidents of a lease as they existed in England at the time of the foundation of the colonies became a part of the common law of each of the American states which adopted the common law as its basis of jurisprudence. When, therefore, we speak of the common law rights of a lessee in any of the American states, we mean the rights which a lessee had in England at the time the colonies were founded. This, as we have already shown, was not the original common law right, but the right as developed and altered by statute to give the lessee an interest in the land itself and to make a lease a conveyance of an interest in land. Under the common law of every American state, therefore, a lease is a conveyance of an interest in land, and is for all practical purposes a sale of the subject matter of the lease for a term of years instead of in perpetuity.

In principle, there is no inherent difference between a sale and a lease. A lease may be said to be a conveyance for a term of years, and a sale a conveyance in perpetuity. Each vests an estate—a sale an estate in perpetuity; a lease an estate for years.

That there is no difference in principle between a leasehold

interest and a fee was recognized by the Supreme Court in *Waskey* v. *Chambers* (1911), 224 U. S. 564.

Mr. Justice Holmes, in giving the opinion of the court, said (pp. 565-6):

> "It is obvious that in principle the right of a lessee is the same as that of a purchaser in fee. . . . Blackstone defines a lease as a conveyance, 2 Com. 317, and in Sheppard's Touchstone, 267, leases are ranked under the head of grants,—'as in other grants.'"

We now pass to our next point, reserving for later consideration the argument of counsel for the Government that the lease of the Central Pacific lines to the Southern Pacific Company was invalid.

III.

THE ACT OF JULY 7, 1898 (30 STAT. 652, 659) CREATING THE COMMISSION FOR THE SETTLEMENT OF THE CENTRAL PACIFIC DEBT, INVESTED THE COMMISSION WITH FULL AUTHORITY TO AGREE TO THE PLAN SUBSEQUENTLY ARRANGED FOR THE PAYMENT OF THE INDEBTEDNESS, INCLUDING THE PROVISION BY WHICH THE SOUTHERN PACIFIC COMPANY ACQUIRED THE STOCK OF THE CENTRAL PACIFIC COMPANY.

March 16, 1897, Mr. Gear introduced a bill for the appointment of a commission consisting of the Secretary of the Treasury, Secretary of the Interior and the Attorney General to settle the debt of the bond-aided Central Pacific lines (statement of the case, p. 107, *supra*). The report accompanying the bill speaks of the failure of Congress to enact any measures for the adjustment of the Central Pacific indebtedness as follows (p. 110, *supra*):

> "In each instance, however, the proposed bills have failed, either on account of failure of the Houses of Congress to reach them for consideration, or on account of

> adverse action which it is believed was predicated, to a controlling extent, upon the conviction that Congress, with the vast multiplicity of matters constantly demanding its attention, could not devote the requisite time to the grave consideration of the many diverse elements affecting this question and necessarily affecting any specific plan devised for its adjustment."

The report proceeds to point out that it was believed that the matter could be more adequately dealt with by three members of the Cabinet, subject to the approval of the President. This plan, as we know, was adopted by the enactment of the law passed July 7, 1898.

The lease of the Central Pacific to the Southern Pacific of February 17, 1885, was laid before Congress, February 5, 1886 (p. 96, *supra*), and all of the later leases except one were laid before Congress, January 13, 1897 (p. 106, *supra*). The exception is the lease of April 15, 1897, which was not then executed. Its sole purpose was to make the fiscal year, for purposes of accounting, conform to the requirement of the Interstate Commerce Commission.

It is clear, therefore, that Congress understood the situation very fully, and knew that the Southern Pacific owned the Central Pacific lines for a 99-year term ending January 1, 1984.

It is also to be remembered that the Act of July 7, 1898, was intended to procure a settlement and not to bring about a foreclosure. The Government wished its debt paid; it did not wish foreclosure. Senator Gear's report of March 16, 1897, says:

> "It is believed, however, that a result much more advantageous to the United States can be reached by agreement with the Railroad Company than would be reached by a foreclosure of the second lien held by the Government, subject to this large first mortgage lien, or by the foreclosure of the first mortgage and the Government liens concurrently."

The Act, therefore, was an Act for an adjustment and settlement with both the Central Pacific and Southern Pacific companies. It was inconceivable that any settlement could be reached without the consent of the Southern Pacific Company.

There could be foreclosure of course, but foreclosure was neither intended nor desired.

Mr. Cannon summed up the whole matter when he spoke the last word concerning the measure on the day before it became a law. Closing the debate in the House he said that by the terms of the law the commission could make an arrangement for the settlement of the Central Pacific debt "with the Southern Pacific or with the Union Pacific or with the Rock Island or with the Northwestern, or with anybody" else (p. 114, *supra*).

It is therefore reasonably assured that Congress contemplated the likelihood of an adjustment of the matter through the Southern Pacific, actuated by its interest in and affiliations with the Central Pacific. The fact that the President and the three members of his Cabinet saw nothing wrong in making the settlement does not suggest that they were unmindful of their duty, but argues that what they did was in full performance of their duty and quite within the law, and the contemplation of Congress.

IV.

IN ANY EVENT THE GOVERNMENT IS ESTOPPED BY ITS CONDUCT TO QUESTION THE LEGALITY OF THE UNIFIED CONTROL OF THE CENTRAL PACIFIC AND THE SOUTHERN PACIFIC LINES.

The 99-year lease by the Central Pacific to the Southern Pacific Company is dated February 17, 1885. The Southern Pacific Company took over the operation of the Central Pacific lines April 1, 1885, and, of course, the fact that it had done so was a matter of common knowledge throughout the country. The obligations of the Central Pacific to the Government consequent upon the bond aid which it received in the construction of its lines, made it necessary to notify the Government of the lease practically contemporaneously with the event, and that

it did so appears from the mention of the lease in the report of the Secretary of the Interior dated November 1, 1885 (p. 95, *supra*). On February 5, 1886, the lease was laid before Congress pursuant to its request (p. 96, *supra*). The existence of the 99-year term created by the lease was frequently considered in Congress in relation to the measures for the refunding of the indebtedness, and in all or nearly all of those measures it was required that the Southern Pacific should insure the financial ability of the Central Pacific to pay the amount which was due. To sum up briefly, it may be said that Congress dealt with the matter as though the debt could not be settled without the concurrence or participation in the settlement by the Southern Pacific Company. It is true that the 99-year lease was subordinate to the bond issues and to the Government's lien, but the Government did not desire foreclosure. It wanted only to collect the amount due and had no disposition to operate the Central Pacific lines. When, therefore, the Act of July 7, 1898, was passed, it was clearly contemplated that the settlement of the debt would require a plan in which the Southern Pacific Company would participate or, at the very least, to which its consent would be necessary and, indeed, vital. It required, of course, no extraordinary knowledge of conveyancing to know that the Southern Pacific could only be cut out by foreclosure; and therefore, as foreclosure was not planned except as a last resort, the participation of the Southern Pacific in the plan was a certainty. As pointed out in the statement of the case (p. 117, *supra*), this settlement required an arrangement that would satisfy (*a*) the bondholders, (*b*) the Government, and (*c*) the stockholders of the Central Pacific. If the stockholders of the Central Pacific did not join in the reorganization of the company, there could be no adjustment of the debt and foreclosure would be inevitable. The plan, therefore, embraced the bondholders, the Government, and the stockholders. It was not necessary to the reorganization that all the persons participating in the plan should execute the same instrument; in fact, it frequently occurs in complicated transactions that they do not do so. In dealing with such a transaction, however, it often happens after the event that the instruments are treated, construed and given effect as though they were one instrument.

In *Mercantile Securities Co.* v. *Ladd* (C. C. A., 2nd Cir. (1909), 173 Fed. 269, a very complicated plan involved a lease of surface street railway systems in the City of New York, and instruments executed in transactions incident to the lease. The contracts were not all made by the same persons, but they were nevertheless held to constitute a single contract in the language following:

> "In our opinion the true view of the obligation between these parties can only be obtained by considering all the traction companies as being merely parts or administrative divisions of one complex concern, and all the separate contracts executed, in relation to obtaining $8,000,000 for the New York City Company, *as being one contract,* to be construed together." . . . "These four contracts were made at the same time, were in *pari materia,* and are to be construed together as constituting, in fact, one contract."

This is in accordance with the general rule. Thus, in Page on Contracts, Sec. 1116, it is said:

> "Even if two writings are executed on different dates and between different parties, they may from their subject matter be so connected that even without express reference the later contract is to be construed as to be read in connection with the earlier."

9 Cyc. page 581, reads as follows:

> "As a rule, several instruments executed at the same time and relating to the same subject matter cannot be construed together as one contract, unless they are between the same parties, but sometimes this may be done" (citing cases).

In the early case of *Gammon* v. *Freeman* (1850), 31 Maine, 243, it was held:

> "To constitute several conveyances parts of the same transaction, it is not necessary that the deeds bear the same date; nor that in each of the deeds, the parties should be the same persons."

In the body of the opinion, the Court said (p. 245):

> "It will be sufficient that the deeds are delivered at the same time to accomplish the agreed purpose."

In *McDonald* v. *Wolf* (1890), 40 Mo. App. 302, the syllabus is as follows:

> "When several instruments are executed at the same time in relation to the same subject-matter and to accomplish a common purpose, and the execution thereof is known to every party to either instrument, they should be construed as one contract, though the parties to each instrument are not the same."

In the body of the opinion, the Court said (p. 308):

> "The plaintiff's contracts with defendant and Bowman were of the same date; they related to the same subject-matter; had but a single object, and were substantially between the same parties. It is a well-recognized rule of law that a contract may be contained in several instruments, which, if made at the same time, between the same parties and in relation to the same subject-matter, will be held to constitute but one contract; and for the purpose of arriving at the true intention of the parties all the instruments will be read as one, and the recitals in each may be explained or limited by reference to the others; and it is not necessary that the instruments should in terms refer to each other. . . . In the case of *Gammon* v. *Freeman, supra,* the Supreme Court of Maine held that, to make two or more instruments one transaction or contract, it was not necessary that the parties to each instrument should be the same; it was sufficient if the contracts were known to all the parties, and were delivered at the same time to accomplish an agreed purpose."

Similarly in *Houck* v. *Frisbee* (1896), 66 Mo. App. 16, the syllabus is as follows:

> "A contract may be contained in several instruments. These, if made at the same time, between the same parties and in relation to the same subject-matter, may be read together as one instrument, and the recitals in one way be explained or limited by reference to the other; nor is it necessary that the instruments should in terms refer to each other. And the rule obtains even

> when the parties are not the same, if the several contracts were known to all the parties and were delivered at the same time to accomplish an agreed purpose."

The two Missouri cases last cited were quoted with approval in *Western Adv. Co.* v. *Star Publishing Co.* (1910), (Mo.), 123 S. W. 969, wherein the syllabus is as follows:

> "Several instruments, if made at the same time, between the same parties, and in relation to the same subject-matter, will be read together as one contract, even in the absence of any reference in one to the other, and though the parties are not the same, if the contracts were known to all the parties, and were delivered at the same time to accomplish an agreed purpose."

A recent case sustaining the rule is *Bass* v. *Occidental Life Ins. Co.* (1914), (New Mexico), 142 Pac. 798, wherein the syllabus is as follows:

> "Even if two writings are executed on different dates and between different parties, they may from their subject-matter be so connected that, even without express reference, the latter contract is to be so construed as to be read in connection with the earlier."

In the body of the opinion the Court quoted with approval the cases of *McDonald* v. *Wolf* and *Houck* v. *Frisbee,* also Sec. 1116 of Page on Contracts.

In the following cases instruments executed by different parties were construed together, and the procedure was not questioned:

Logan v. *Tibbott* (1854), 4 Green (Ia.) 389;
Bradley v. *Marshall* (1870), 54 Ill. 173;
Turber v. *Field* (1887), 13 N. Y. S. 12;
Shaw v. *First Baptist Church* (1890), 44 Minn. 22; 46 N. W. 146;
Roberts v. *Wonnegut* (1914), (Ind.), 104 N. E. 321.

It is not to be said that the entire plan was not known to the President and to the three members of his Cabinet, for the uncontradicted evidence is to the contrary.

The agreement was executed for the Government by President McKinley, Secretary Bliss and Attorney-General Griggs February 15, 1899, and by Secretary Gage February 16, 1899. The settlement was reported to both Houses of Congress February 20, 1899. Five days later the plan in full, accompanied by a comprehensive editorial review, appeared in the *Commercial & Financial Chronicle* February 25, 1899 (6 R. 2258-2268). This paper is one of the leading financial journals of the country and throughout the year, subsequent to February 25, 1899, frequent accounts of the plan for the reorganization of the Central Pacific appeared in its columns (6 R. 2268-2279).

It is clear upon the facts stated that the Government is estopped to dispute the validity of the 99-year lease or of the acquisition of the Central Pacific stock of the Southern Pacific Company. It remains for us to enquire whether the defense of Government estoppel is available to us. In support of this proposition we rely upon the authorities following:

In *United States* v. *Detroit Timber & Lumber Co.* (C. C. A. 8th C.), 131 Fed. 668, Sanborn, Circuit Judge, says:

> "This is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances."

In *State of Iowa* v. *Carr* (C. C. A. 8th C.), 191 Fed. 257. 266, Sanborn, Circuit Judge, says:

> "They (counsel for appellants) also contend that every sovereignty is exempted from the rule of equitable estoppel. But the great weight of authority, the stronger reason, and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances."

The State v. *Illinois Central R. R. Co.,* 246 Ill. 188:

> "Cases may arise of such a character that right and justice will require that estoppel may be asserted even against the State when acting in its governmental capacity."

In *United States* v. *Flint,* 4 Sawyer, 42, 58; affirmed in 98 U. S. 58, Mr. Justice Field says:

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial or take an appeal within the same time and in like manner, and they are equally bound to act upon evidence within their reach. *And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief."*

In *United States* v. *Clark* (C. C. A. 9th C.), 138 Federal, 294, 299, Ross, Circuit Judge, says:

> "As a matter of course, when the government comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances, etc."

In *U. S.* v. *Flint,* Fed. Cas. No. 15,121 (Field, Circuit Judge), it is said:

> "If, on consideration of the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, although the United States be the suitor."

In *United States* v. *White,* 17 Fed. 561-565, Sawyer, J., says:

> "When the United States goes into a court of equity as a suitor, it is subject to the defenses peculiar to that court."

In the case of *The Siren,* 7 Wallace, 152-159, the Court says:

> That the government by its appearance in court "waives its exemption and submits to the application of the same principles by which justice is administered between private suitors."

In *Commonwealth* v. *Turnpike Co.,* 153 Pa. St. 47, 54, the Court says:

> "In England, from whence we derived the great body of common law, and most of our principles in equity, it is well settled that while time will not run against the crown, yet time, together with other elements, may make up a species of fraud and estop even sovereignty from exercising its legal rights."

The relation of acquiescence to estoppel is well expressed in *Norfolk Railroad Co.* vs. *Perdue,* 40 W. Va. 442, in the following contract:

> "If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term 'acquiescence', and in that sense it may be defined 'quiescence', under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct."

V.

THE PRESENT STATUS OF THE SOUTHERN PACIFIC-CENTRAL PACIFIC LINES WAS CONFIRMED BY THE ACTS OF MARCH 3, 1899 (30 STAT. 1245), AND MARCH 3, 1901 (31 STAT. 1023).

In the statement of the case (p. 135, *supra*), we deal with the Act of March 3, 1899, conferring authority upon the Secretary of the Treasury to carry into effect the settlement of the Southern Pacific-Central Pacific indebtedness to the Government; and (p. 142, *supra*), we deal with the Act of March 3, 1901, which recognized the settlement so made and authorized credits to be given on the notes executed and delivered to the Government as a part of that settlement.

If these Acts had been less plain, clear and explicit than they are, they would nevertheless have been sufficient to ratify the settlement made by the Government, including the provision by which the Central Pacific stock was acquired by the Southern Pacific Company. This will appear from the following authorities:

In *Grogan* v. *San Francisco,* 18 Cal. 590, 609, Mr. Justice Field says:

> "The State may ratify the acts of her agents upon a subject within the constitutional control of the Legislature, when they exceed their powers. *She may do this by legislation directly affirming the acts, or by legislation proceeding upon their assumed validity.*"

In *Abbott* v. *N. Y., etc., R. R. Co.,* 145 Mass. 450, 459, Mr. Justice Holmes says:

> "It thus appears that for twenty years the Commonwealth has constantly dealt with this corporation and its predecessor as having a good title to the road, and as having possessed the powers which they assumed to exercise. The Commonwealth has advanced a large sum of money on that assumption. For nearly twenty years before these actions were brought the plaintiffs have acquiesced in the same view, while the road over their lands has been in public operation. Meantime the mortgage

> was made, and the bonds were sold in the market. *We think that courts should be slow to pronounce the Legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will, when for so long a time everything has been conducted upon that footing.* But we are satisfied, for the reasons which we have given, that the opinion of the Legislature was correct, and that the Boston, Hartford, and Erie Railroad Company must be taken to have had the power and right to make its location of July 30, 1866."

In *Deseret Salt Co.* v. *Tarpey,* 142 U. S. 241, Mr. Justice Field, speaking for the Court, says:

> "We do not think the provision was designed to impair the force of the operative words of Transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company, *with the express or implied assent of the government.*"

In *United States* v. *Northern Pacific Ry. Co.,* 177 U. S. 435, 441, Mr. Justice Shiras, speaking for the Court, says:

> "There would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approval of the same."

In the case of *State* vs. *Hallock,* 20 Nev. 73, it was held that the legislature of the state acquired knowledge of the methods pursued by the fiscal officers of the state in dealing with appropriations made by it for the carrying on of the Government, through the reports of the Comptroller which were annually transmitted to the legislature. At page 74 of the opinion the court says:

> "At each biennial session the legislature appropriates money for the purpose of carrying on the government for the two years then running. . . . The fiscal officers of the state government have uniformly construed these laws, by usage, as intending an appropriation for the limited time only; that is to say, the appropriation is to meet, within the named fiscal years, the liabilities incurred during those years. Unexpended

> balances against which no warrants have been drawn are considered as having lapsed, and are carried to the general fund of the treasury. This manner of treating appropriations made for the support of the civil government *is known to the legislature from the annual reports of the comptroller, submitted at each session for its information.*"

In *Michigan Land & Lumber Co.* vs. *Rust*, 68 Fed. 155, 164, the court said:

> "The state . . . in its legislative capacity knew how the adjustment (of the state land grant) was going forward. The reports of the Commissioner of the State Land Office showed it, and the legislature of 1857 enacted a statute to forbid sales of lands before patents were received."

In *Michigan* vs. *Jackson, etc., R. Co.* (C. C. A., 6th Cir.), 69 Fed. 116, 121, the court said:

> *"Express knowledge was communicated to successive legislatures by the reports of the Commissioner of the State Land Office, and messages from the Executive."*

Shaw vs. *Kellogg*, 70 U. S. 339, has held that reports of the Surveyor-General and of the Land Department made to Congress, are notice of their contents to the legislative body.

> "As it appears by the report of the Surveyor-General and of the Land Department, transmitted to Congress in 1864, the fact that this land had been finally appropriated to the claim of the Baca heirs was disclosed. *Mention of that fact was also made in subsequent reports to that body, and yet from that time to the present Congress has taken no action in the matter, and has thus by its silence confirmed the proceedings of the Land Department.*"

In *State* vs. *New Orleans*, 104 La. 685, 690, it appeared that the State had granted to a railroad company a right of way for its road over some public land adjoining a canal, and the Com-

pany had subsequently tranferred this right to another company. The Court said:

> "The State was formally notified of what had been done, and was apprised not only of the fact that its grantee had transferred all the rights granted, including the free use of the land in question, but was informed of the manner of the transfer and the consideration therefor, *by the filing in the office of the Secretary of State in January, 1876, of a copy of the instrument by which the said transfer was effected.*"

In *State* vs. *Flint, etc., Railroad Co.,* 89 Mich., 481, 491-2, certificates prepared by the Department of the Interior, attesting that the lands in controversy had been granted to the State under the Railroad Act of June 3, 1856, were filed in the appropriate state department; and it was held that the filing in the department of these certificates was notice to the State that it had acquired the lands under the Act referred to.

> "The identification of these lands," said the court, "and their certification to the State, were a solemn declaration on the part of the United States that they came to the State under the railroad grant, and not under the swamp-land grant. This declaration stood for 28 years without challenge from the State, and *with the evidence thereof on file in its own department. It knew that the railroad company took these lands under the railroad act.*"

In *Atchison* v. *Peterson,* 20 Wall. 507, 512, the court said:

> *"The government, by its silent acquiescence, assented* to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement."

In *Buford* v. *Houtz,* 133 U. S. 320, the court, while speaking of the depasturing of the public lands by the public, said (p. 326):

> *"The Government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be*

safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement."

Finally, we may say of our rights, as was said in *Broder* v. *Water Co.,* 101 U. S. 274, of the rights of the miners (p. 276):

> [These] "are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect."

VI.

IT IS ESTABLISHED CONCLUSIVELY BY THE OPINION AND DECREE IN UNITED STATES vs. UNION PACIFIC RAILROAD COMPANY (1912), 226 U. S. 61, THAT UP TO THE TIME OF THE UNION PACIFIC MERGER IN 1901, "SHARP, WELL DEFINED AND VIGOROUS" COMPETITION EXISTED BETWEEN THE OGDEN AND EL PASO ROUTES, NOTWITHSTANDING THE OWNERSHIP OF THE CENTRAL PACIFIC BY THE SOUTHERN PACIFIC; AND IT IS HERE IN PROOF THAT THE COMPETITIVE CONDITIONS OF 1901 AND BEFORE WERE RESTORED AFTER THE UNMERGER IN 1913.

In this case the defendants offered in evidence the Government's Brief of Facts filed in the Supreme Court in the Union Pacific Case (III R. 933).

In that brief the Government argued (p. 39) that

> "there was the same incentive to active, energetic competition between these lines [the Ogden and El Paso routes] that there would have been had the Southern Pacific not owned the line between Ogden and San Francisco."

Again (p. 78):

> [The defendants] "made no effort to break down or contradict the showing made by the complainant as to the active competition thus existing up to the time of the merger between the two systems."

Again (p. 86):

> "The Southern Pacific, *as a matter of self-preservation,* was always compelled to and did gladly interchange business with the Union Pacific, accepting for its share of the through haul, the division of the through rate accorded to it by consent, from 1870 down to the present time."

Again (p. 88):

> "It is a new suggestion born out of the necessities of this case, that the Union Pacific could not be a competitor of the Sunset Route of the Southern Pacific because it does not reach through to California, and hence had no power independent of its connections to make rates."

Again (p. 276):

> "The Southern Pacific was helpless to destroy that competition simply by the ownership of the line from Ogden to San Francisco."

These extracts from the Brief of Facts show clearly what the Government attempted to establish in the Union Pacific case. The decision of the Supreme Court upon the point was in accordance with the contention of the Government, and it was found in terms and declared to be the fact that, notwithstanding the ownership of the Central Pacific by the Southern Pacific, competition between the Ogden and El Paso lines at the time of the merger in 1901 and before was "sharp, well defined and vigorous".

The Southern Pacific Company was a party defendant in the Union Pacific suit from the beginning and the Central Pacific Railway Company became a party before the final decree. The opinion and decree of the Supreme Court in the case is, therefore, binding upon the Government, and conclusively determines the fact.

It has been established by uncontradicted testimony in the present case that the competitive conditions which existed in 1901 and before have existed ever since the unmerger in 1913 (p. 167, *supra;* also Spence, III R. 1038).

VII.

IT IS THUS APPARENT THAT WE MAY DRAW UPON THE THREE DEPARTMENTS OF THE GOVERNMENT OF THE UNITED STATES FOR SUPPORT IN OUR POSITION THAT THE SOUTHERN PACIFIC MAY AND DOES LAWFULLY CONTROL AND OPERATE THE CENTRAL PACIFIC AND THAT NO VIOLATION OF THE ANTI-TRUST LAW IS INVOLVED IN SUCH CONTROL AND OPERATION.

Legislative Action.

The long acquiescence of Congress in the control of the Central Pacific by the Southern Pacific arising out of the lease of February 17, 1885; the Act creating a commission "*with full power to settle* the indebtedness to the Government" which was clearly intended to give authority if the Commission were so minded, to deal with the Southern Pacific; and the passage of the Acts of March 3, 1899 (30 Stat. 1245), and March 3, 1901 (31 Stat. 1023), whereby Congress ratified the action of the Commission in participating in a plan having for one of its essential features the acquisition of the Central Pacific stock by the Southern Pacific—all establish beyond peradventure a determination by Congress that the ownership of the Central Pacific by the Southern Pacific did not involve undue restraint of commerce or any other violation of the Anti-trust law.

Executive Action.

The same determination was made by the Executive Department of the Government. The President, Secretary of the Treasury, Secretary of the Interior and Attorney General, upon a full understanding of the facts, entered into a plan which included the acquisition of the Central Pacific stock by the Southern Pacific Company as one of its essential features, and their action can only be interpreted to mean that they determined by implication that the ownership of the Central Pacific by the Southern Pacific did not involve an undue restraint of com-

merce nor the violation of any other provision of the Anti-trust law.

It is true that Attorney General Griggs was asked if that question had been considered or discussed, and that he answered no (III R. 1008), but the very fact that it did not arise and did not suggest itself to any of the officers of the Government, is striking proof that the plan was not unlawful in conception or execution.

Judicial Action.

We have already shown that the Union Pacific case determined that no undue restraint of commerce resulted from the ownership of the Central Pacific by the Southern Pacific.

The entire absence of complaint by the Government, or any of its officers or departments, from 1899 to 1913, against the acquisition of the Central Pacific stock by the Southern Pacific Company.

Silence and acquiescence when it would be a duty or natural to speak in protest, were protest justified, is taken the world over as evidence of the rightfulness of conduct. This principle, born of common experience, is applicable to the present case. The Government knew, the whole world knew, that the Southern Pacific acquired the Central Pacific stock, and they knew it in 1899. There was no protest by the executive department of the Government—there was no protest by Congress—that the Government had been overreached, or that in the settlement of the Government debt with the Central Pacific the Southern Pacific had brought about an illegal combination and violated the Anti-trust law. The Government acquiesced in the purchase. There was no protest or murmur, no challenge, until in 1913 (fourteen years after the event) when the then Attorney General, while attempting to devise a plan for the disposition of Southern Pacific stock held by the Union Pacific, conceived the idea that the Southern Pacific should be compelled to sell the Central Pacific to the Union Pacific.

We rely upon these fourteen years of silence and acquiescence for persuasive and indeed, compelling evidence and argument, both in point of fact and of law, that the Southern Pacific rightfully and lawfully acquired the stock of the Central Pacific.

VIII.

IRRESPECTIVE OF THE CONSIDERATIONS ALREADY DEALT WITH, AND CONSIDERING THE MATTER AS AN OPEN QUESTION, TRAFFIC CONDITIONS BETWEEN THE EL PASO AND OGDEN ROUTES ARE SUCH THAT THE CONTROL OF THE CENTRAL PACIFIC LINE BY THE SOUTHERN PACIFIC COMPANY, DOES NOT CONSTITUTE AN UNDUE RESTRAINT OF COMMERCE.

If we eliminate from consideration the matters already discussed, and consider as an original question the effect on competition of the control of the Central Pacific line by the Southern Pacific Company, we find that such control involves no unlawful restraint of commerce. It must be borne in mind, as already stated, that the purpose of the Anti-trust act of 1890 was to secure reasonable rates and adequate facilities for transportation. The Government had no concern with the division of traffic among the carriers nor with their apportionment of the rates. The principle underlying the rule which inhibits unlawful restraint of competition is that such restraint operates to the public detriment either in the increasing of rates or in the lessening of transportation facilities. Vigorous, energetic competition usually has its effect in a decrease of the rate or a betterment of the service, or possibly in both. On the other hand, suppression of competition manifests itself in impairment of service or in an increase of rates. If, therefore, the control by the Southern Pacific Company of the Central Pacific line does not, and by reason of existing conditions cannot produce those results, which usually follow a suppression of competition, it must be held that such control is not unlawful. A control which produces none of the effects of an unlawful suppression of competition cannot be said to unlawfully restrain commerce. The evidence in this case conclusively establishes that none of the consequences of suppression of competition has resulted or can result from the control of the Central Pacific line by the Southern Pacific Company.

In discussing these conditions it must further be borne in

mind that the Central Pacific line from Ogden west, in and of itself, is not a competitor of the Southern Pacific Sunset Route. It is only when a constructive unity is imposed upon the Central Pacific Line to Ogden, the Union Pacific line which it there meets and the eastern connections of the latter, that this constructively unified line can be said to be a competitor of the Sunset Gulf route. Such is the theory of the petition in the present case. It is alleged, not that the Central Pacific line is a competitor of the Sunset Gulf route, but that the Central Pacific line with its eastern connections is a competitor (I R. 7).

It must further be noted that competition between these two lines can only proceed within certain inherent and natural limitations,—limitations (*a*) of territory, and (*b*) of commodities.

For example, the Sunset Gulf route and the Central route through Ogden are not competitors for traffic originating in the middle West and destined to Southern California (I R. 365). The existence of the line from Salt Lake to San Pedro controlled by the Union Pacific Railroad Company is shorter by some four hundred miles than the route through Sacramento, via Ogden, and consequently no appreciable traffic having the origin or destination above mentioned now moves via Ogden and Sacramento (I R. 361). On the contrary it is actively competed for by the Union Pacific and its San Pedro branch and the Sunset route through its connections at El Paso (I R. 364). On traffic originating in the Middle West and destined to Central or Northern California, the Sunset Gulf route has scarcely ever been a substantial factor. The Ogden route as to such traffic is, and always has been, the best and shortest route, and according to the Government's chief witness (Mr. Connor), any Middle West shipper who understood his business and knew anything about traffic conditions would select the Ogden route for Northern and Central California freight (I R. 364). This same witness gave it as his prediction that by 1917, seventy-five per cent. of this traffic would pass over the Ogden route, twenty per cent. over the Santa Fe, and the other five per cent. over the Western Pacific. The Sunset Gulf route would be completely

eliminated from this traffic (I R. 362, 363). Thus it would appear that on traffic originating in the Middle West and destined to Southern California, the route by way of Ogden has been eliminated as a competitive factor by reason of the advent of the Union Pacific line between Salt Lake and San Pedro. On the other hand, the Sunset Gulf route has never been a substantial factor in the transportation of freight originating in the Middle West and destined to Central and Northern California, and within three years will be completely eliminated with respect to such traffic. For the same reasons, the Ogden route has been eliminated with respect to traffic originating in Atlantic seaboard territory, being the territory east of Buffalo, Pittsburg and Cleveland and north of the Ohio and Potomac Rivers (I R. 61), and destined to Southern California.

The natural limitations imposed upon competitive relations by territory, is shown by Mr. Lincoln, a witness for the petitioner, when speaking of the competition between the Santa Fe and Ogden route, the Western Pacific and the Rock Island. He says: "They are restricted, as I say—some of the main lines in the territory of competition—by reason of natural conditions, and by reason of service. A fair illustration of the competition that existed in 1901 and the competition that exists today, is this: At one time there was considerable traffic moving through Central Freight Association territory—not from Chicago proper, but Central Freight Association Territory, Ohio and Indiana points—down by way of New Orleans to California points, *and I do not believe that there is much of that business moving today* because it is too long a line. Today that business will move for San Francisco through the Missouri River gateways very largely, and to Southern California through the Southwestern gateways." (I R. 126, 127.)

So also competition between the Sunset line and the Ogden line is inherently restricted by the character of the commodity carried. Certain traffic cannot be moved by a mixed rail and water line (III R. 1036, 1037). Climatic conditions also act as an inherent limitation upon competition between the two lines. Thus, perishable fruits and vegetables and the like at certain periods of the year on account of the heat cannot be moved

over the Sunset route without the extra expense of refrigeration. (I R. 165, 184, 185.)

With respect, however, to all territory and to every class of freight as to which the Sunset and the Ogden routes are able to compete, the record shows that the competition between them, as it was stated to be by the Supreme Court in the Union Pacific case, is "sharp, well defined and vigorous." We would repeat that the Sunset route is not and cannot be a competitor of the Ogden route considered alone. (II R. 736.) It is and can be a competitor only of the Ogden route when considered with the eastern connections of the latter, and so considered, the evidence shows that not only is the competition between the two lines active, vigorous and substantial, but that it would not be rendered more so by a separation of the Central Pacific from the Southern Pacific control (I R. 157).

There is in evidence as Defendant's Exhibit No. 56 a map prepared by Mr. Spence, one of the witnesses for the defendant, showing the competitive routes for transcontinental traffic on December 31, 1900, and another map prepared by Mr. Spence (Defendant's Exhibit No. 57), showing the competitive routes for transcontinental traffic existing October 1, 1914. A description of the latter routes will be found in the testimony of Mr. Spence (III R. 1026-1028).

Mr. Spence further testifies that the competition existing among the various routes for the traffic between the Atlantic and the Pacific (and as we have already stated, the only traffic as to which the Sunset Route and the Ogden route are in any practical sense competitive) is "very active and acute" (III R. 1028).

Mr. Spence further testified:

> "Q. What is the extent and degree of competition now existing as to traffic between northern and central California and the Atlantic seaboard territory? A. It is even more acute and intense.
>
> Q. Is that true both as to the number of competitors and the fierceness of the competition? A. Yes" (III R. 1028).

The reasons for the intenseness and fierceness of this competition is easily understood from the fact that forty-six railroad companies maintain soliciting organizations in California which are striving to route Atlantic seaboard traffic otherwise than over the Sunset Gulf route. (III R. 1039.) And fifty-nine railroad companies maintain soliciting organizations for the same purpose in the Atlantic seaboard territory. (III R. 1040.) Thus in order to secure transcontinental traffic between the Pacific and the Atlantic, the Sunset Route has to overcome the combined efforts of forty-six soliciting agencies in California and about fifty-nine such organizations in the East. The only effect that could follow a separation of the control of the Central Pacific and the Southern Pacific would be the establishment of another soliciting organization. This, however, would have no effect at all upon competition, according to Mr. Schumacher, Chairman of the Board of Directors of the Chicago, Rock Island and Pacific Railway, and for many years an officer of the Union Pacific Railroad Company. (I R. 157.)

As a general thing the through rates on transcontinental traffic are the same over the different routes. Rates, therefore, do not cut much figure in striving for the traffic (I R. 165, 166). The only inducement, therefore, that the solicitor can hold forth to secure the traffic is the inducement of service. It is clear that no better service could result merely because one more soliciting agency was in the field seeking traffic. Solicitation is not service. It is merely an endeavor to induce shippers to avail themselves of existing service by advertising that service. This is what is now being made by forty-six organizations in California for eastbound freight and about fifty-nine organizations in the East for westbound freight. The advertisement of the Ogden route and of the service obtainable over it is as complete as it could be. In the advertising of this route the Southern Pacific Company actively co-operates with the Union Pacific Company. The two companies expend annually the sum of $140,000 in advertisement and solicitation for the Ogden route, and apportion this amount ratably between them (III R. 1046). This fund is under the control of the Union Pacific Company whose entire interest is adverse to the Sunset-Gulf

route and whose entire activities are directed against the diversion of freight from the Ogden route. How, then, can it be claimed that a separate solicitation of traffic by the Central Pacific Company, whose interests in the Ogden route are identical with that of the Union Pacific Company, could affect service over the Ogden route or even the solicitation of traffic?

It is idle to say that the existing competition, "acute and fierce" in the language of the witness, would be at all affected by the separation of the two routes. The fact that the Southern Pacific solicits traffic for its Sunset route which might otherwise pass over the Ogden route does not in any wise affect the through service of the Ogden route. Such is the testimony of Mr. Schumacher (I R. 173). With the Union Pacific and all of its connections doing their utmost to route freight through the Ogden gate for Northern and Central California, how can it be said that competition will be in any wise increased by a separation of the Central Pacific from the Southern Pacific? The Central Pacific as a link in the transcontinental line, is dependent upon the westbound freight which its eastern connections bring to it. All of these lines are actively, energetically, strenuously and even fiercely striving to secure this traffic, and prevent the Southern Pacific from getting it. In fact, so acute is the competition now existing, that Judge Lovett, Chairman of the Executive Committee of the Union Pacific Railroad Company, and a witness for the petitioner, doubted whether the Union Pacific line, which is dependent upon the Central Pacific as to Central and Northern California freight, would get any more business, if it actually owned that line, and thus came directly in contact with the shippers (I R. 295).

That competition would be lessened by a separation of the Central Pacific lines from Southern Pacific control, is the opinion of Mr. Chambers, Vice-President of the Santa Fe, who stated that the Santa Fe "would have a better chance to compete with the two than . . . with the one" (III R. 971).

Practical railroad considerations preclude the idea that any change of competitive conditions would result from a separation of the Central Pacific from the Southern Pacific.

It is attested by the officials of the Union Pacific that the

facilities of transportation afforded by the Central Pacific line to the Union Pacific were of the highest order, and that such facilities would not be increased. In fact Mr. Spence testified that the transcontinental line by way of Ogden is the "best through transcontinental line, taking passenger and freight service together, across the country" (III R. 1046).

Existing competitive conditions demand that the high order of efficiency which has made the Ogden route the best transcontinental line in the country be maintained. As pointed out both by Mr. Sproule, President of the Southern Pacific, and Mr. Kruttschnit, Chairman of the Executive Committee of the same company, the Southern Pacific as owner of the stock of the Central Pacific, and as guarantor of the bonds of the latter, has too great a financial interest at stake to allow the facilities of transportation over the Ogden route to be in any wise impaired. About 30 to 33% of the dividends of the Southern Pacific stockholders are contributed by the earnings of the Central Pacific line (II R. 734). The bonds of the Central Pacific guaranteed by the Southern Pacific aggregate $169,000,000 (II R. 734). Again it would be suicidal on the part of the Southern Pacific to permit any impairment of the Ogden route, in the hope of diverting traffic to the Sunset route. The effect of such a policy would probably be the loss of the freight altogether, for should it be lost by the Sunset route it would be captured by the Santa Fé. It would be impossible to impair the service on the Ogden route, west of Ogden, and confine the effects of that impairment of service to the business which is competitive with the Sunset-Gulf route. Shippers finding the service not good on the Southern Pacific would decline shipping thereon, and the Sunset route would have a small chance of getting the freight that had been lost to the Ogden route. The shipper would ship by the Santa Fe, or the Western Pacific, so that the lessening of the efficiency of the service over the Ogden route would influence traffic, which by reason of the natural inherent limitations which we have hereinbefore discussed, is not competitive with the Sunset route. If the excellence of the service on the Central Pacific line was lowered, the Southern Pacific Company would lose such traffic to the Santa Fe or the Western Pacific.

We submit that not only would competition not be increased in the slightest degree by the separation of the Southern Pacific from the Central Pacific, but rates would not be lowered, nor transportation facilities increased. It is equally clear that notwithstanding the unified control of the Central Pacific and Southern Pacific lines there is not, and in the nature of things cannot be any temptation for the Southern Pacific Company to impair the services over the Ogden route. In fact in every practical sense it has no power so to do. When we consider the power of a railroad company to affect service or rates, we do not mean the power to commit financial suicide. A power, the exercise of which can only result in the destruction of the person using it, can hardly be considered among practical business men to be a power at all.

We submit therefore that the traffic conditions existing in the sphere of competitive activities between the Central Pacific line and the Sunset line of the Southern Pacific are such that the control of the Central Pacific by the Southern Pacific Company does not in any wise affect the free and natural play of competition, and therefore is not an unlawful restraint of commerce.

It was held by the Supreme Court in the Union Pacific case, and the evidence in that case conclusively showed that the control of the Central Pacific line by the Southern Pacific Company prior to 1901, did not in any wise affect the free play of competition between the Sunset and the Ogden routes. For much stronger reasons is this true at the present time. Present conditions differ greatly from those existing before 1901. Since that time the Hepburn Law has been passed empowering the Interstate Commerce Commission to establish through routes and joint rates between connecting lines (34 Stat. 509). The shipper by an amendment to the Interstate Commerce Act in 1910 has secured the "right to designate" the routing of his freight (36 Stat. 552). The Panama Canal was opened in August, 1914, and created a class of all-water competition which the all-rail lines find it impossible to meet (III R. 1066). The San Pedro line of the Union Pacific was finished in 1905 and has been operated since that time (I R. 225). The Western Pacific Railway Company having a junction with the Den-

ver and Rio Grande at Salt Lake, was opened to San Francisco in July, 1910 (I R. 225). All of these conditions which are fully discussed in our statement of the case at pp. 183-190, *supra,* have increased the facilities for transportation, and quickened existing competition. We may safely conclude therefore that if the unified control of the Central Pacific-Southern Pacific lines up to 1901 did not unlawfully restrain commerce, it follows in the light of the new competitive conditions and factors which have been created since 1901 that the unified control of the two lines does not now unlawfully or in any wise restrain commerce. The existence of an unlawful restraint on commerce is quickly manifested by protests from shippers. The absence of complaint by shippers has been frequently pointed out by the courts as evidence of a normal competitive condition, and the existence of fair rates and adequate transportation facilities.

In the Union Pacific case, the unlawful restraint imposed upon commerce by the combination of the Union Pacific and the Southern Pacific gave rise to numerous complaints by shippers, many of whom testified in that case. In the present case, however, it is significant that not one shipper has testified to any restraint upon competition or commerce or to the existence of any of the evils that one would naturally expect to result therefrom. We say, therefore, that the absence of this evidence attests in the most positive and practical sense that the unified control of the Central Pacific and of the Southern Pacific lines does not restrict competition or impair service or facilities for transportation.

IX.

THE GOVERNMENT, BY REASON OF THE POSITION TAKEN AND CLAIMS URGED BY IT IN THE UNION PACIFIC CASE, IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE OWNERSHIP AND CONTROL OF THE CENTRAL PACIFIC RAILWAY COMPANY BY THE SOUTHERN PACIFIC COMPANY.

The petition in the Union Pacific case sets forth in detail the lines of railway and steamship lines included in the Union Pacific system, also, the lines of railway and steamship lines of the Southern Pacific system, which is substantially the same as that described in the petition in this case as the lines of railway and steamship lines controlled by the Southern Pacific Company. The petition also particularly alleges that the rail lines of the Southern Pacific Company from the Mississippi river to Portland, Oregon, by way of San Francisco and Los Angeles, were in active competition with the lines of railroad of the Union Pacific Railroad Company for the transportation of vast quantities of freight from points in the Mississippi valley and in the Eastern states, both to and from the Pacific coast and points in Colorado and other interior states, and that the steamship line of the Southern Pacific Company from New York to New Orleans and Galveston, together with its rail lines run in connection therewith, was in active competition with the rail lines of the Union Pacific Railroad Company for a large amount of traffic originating on the Atlantic coast and Central states.

These allegations directly include the competition which was alleged to have existed prior to 1901 between the Central Pacific-Union Pacific line, known as the Ogden route, and the Southern Pacific or Sunset route.

The petition further sets forth the acquisition of the control in 1901 of the Southern Pacific Company by the Union Pacific Railroad Company, alleging that by means of that control the competition formerly existing between the said two railway systems, with their steamship lines, had been destroyed.

The answer of the defendants substantially denied the existence of the competition alleged between these respective railway systems and further sought to justify the acquisition of the control of the Southern Pacific Company for reasons not material here.

It thus appears that the Government, as a necessary basis for its assault upon the control of the Southern Pacific, which had been acquired by the Union Pacific, squarely maintained that prior to that control, created in 1901, there was active and substantial competition between the Central Pacific-Union Pacific Ogden route and the Sunset route.

This was, in effect, asserting that this competition existed notwithstanding the ownership and control of the Central Pacific by the Southern Pacific.

In the Government's brief in the Union Pacific case, filed in the United States Supreme Court, we find an elaborate discussion, with detailed reference to the testimony, showing that prior to the merger, which occurred through the purchase of the Southern Pacific stock by the Union Pacific, there had been active and thorough competition between the Union Pacific system and the Southern Pacific system and, especially, that such competition existed between the Central Pacific-Union Pacific Ogden route on the one hand, and the Sunset route on the other.

Counsel for the Government urged, in substance, that as to the competition between these two transcontinental routes there was at all times prior to the merger the same incentive "to active, energetic competition between these lines that there would have been had the Southern Pacific not owned the line between Ogden and San Francisco." (See page 39 of Government Brief, also, for the discussion generally of this subject, see pages 34 to 272 of the brief.)

The opinion of the Supreme Court of the United States sets forth the contention of the Government that, prior to the stock purchase, the Union Pacific and Southern Pacific were competing systems of railroad engaged in interstate commerce and acted independently as to a large amount of such carrying trade, and that since the acquisition of the stock in question the dominating power of the Union Pacific had eliminated competi-

tion between the two systems. Upon this contention the Supreme Court of the United States finds that:

> "A large amount of the testimony in this voluminous record was given by railroad men of wide experience, business men and shippers, who, with practical unanimity, expressed the view that prior to the stock purchase in question the Union Pacific and Southern Pacific systems were in competition, sharp, well defined and vigorous, for interstate trade."

And the court concluded that such competition had been suppressed by means of the control of the Southern Pacific acquired by the Union Pacific and, therefore, granted the Government appropriate relief to terminate such control.

It thus appears that the Government in the Union Pacific case squarely contended that, prior to the Union Pacific stock purchase in 1901, there was active and vigorous competition between these railway systems and that such competition existed despite the fact that the Southern Pacific Company owned the line between Ogden and San Francisco, which, at the time, was the only line over which the Union Pacific transcontinental traffic could move to and from the Pacific coast, that such competition had been suppressed by the Union Pacific through its control of the Southern Pacific acquired by the stock purchase in question. This contention was squarely sustained by the decision of the United States Supreme Court which granted the Government the relief appropriate to terminate the control of the Southern Pacific by the Union Pacific.

Under a well established rule, sustained, we might say, by all the authorities upon the subject, the Government can not now be heard to claim that the competition between the Central Pacific-Union Pacific line and the Sunset line was suppressed or destroyed by the control of the Central Pacific by the Southern Pacific when it had maintained the contrary of this position, viz., that, notwithstanding such control, there was active and vigorous competition between these two lines, and upon that contention was successful in its former litigation.

The maxim *"Allegans contraria non est audiendus"* expresses, in technical language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with

reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations, according to the prompting of his private interest (Broom's Legal Maxims, 169).

That this rule is at the foundation of the administration of justice is well stated in "Bigelow on Estoppel", page 717, as follows:

> "If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them.
>
> It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose."

The above is quoted and followed in *Canton Roll & Machine Co.* v. *Rolling Mill Co.,* 155 Fed. 341.

Herman on Estoppel, Section 165, reads:

> "A party who either obtains or defeats a judgment by pleading or representing anything in one aspect, is generally held to be estopped from giving the same thing another aspect in a suit founded on the same subject-matter."

In *Railway Co.* v. *McCarthy,* 96 U. S. 268, the Court say:

> "Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principal of law" (96 U. S. 267-8).

In *Davis* v. *Wakelee,* 156 U. S. 680, the Court say:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal pro-

> ceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him" (156 U. S. 689).

To the same effect, see *Town of Weston* v. *Ralston,* 48 W. Va. 180, 186-7.

In *Michels* v. *Olmstead,* 157 U. S. 198, Michels sued Olmstead to recover damages for breach of a written contract. Olmstead offered oral evidence that the writing in question was not intended as a contract nor understood by either party to be binding as such. Upon plaintiff's objection the court excluded this evidence as incompetent to control the written contract. Subsequently Olmstead filed a bill in equity to restrain the prosecution of the action at law, setting forth as grounds for equitable relief the facts which he sought to prove in the action at law, the evidence of which was excluded. In the brief for Michels filed in the equity case, it was suggested that if the writing signed was not intended as a contract this should be set up in the action at law and tried by a jury. To this suggestion, the United States Supreme Court say:

> "But the conclusive answer to the suggestion is, that evidence of this very fact was offered in the action at law, and excluded, upon his objection, as incompetent in that action; and that he is thereby estopped now to assert that it could or should be availed of at law" (157 U. S. 201).

In *Daniels* v. *Tearney,* 102 U. S. 415, suit was brought against Daniels to recover upon a statutory bond given under an unconstitutional statute. The court held that Daniels could not defeat recovery on this bond upon the ground of the unconstitutionality of the statute, saying:

> "Where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect" (102 U. S. 421).

In *Caldwell* v. *Smith,* 77 Ala. 157, Alexander sued Caldwell in ejectment. Caldwell defended that he held the land as tenant under Smith and defeated Alexander's action. Then Smith sued Caldwell for recovery of the land, and he sought to defeat Smith by proving that he held the land under tenancy from Alexander. Chief Justice Stone said:

> "On the strength of Caldwell's testimony on the first trial, he obtained a valuable benefit in the defeat of Alexander's suit. It is now attempted by disproving what was then proved, to secure to Caldwell's estate another benefit, in defeating Smith's suit. One of these lines of defense must, of necessity, be untrue. We may concede it was the first. Yet, under its maintenance as true, Caldwell gained that suit. He will not be allowed to deny it, as a means of defeating this" (77 Ala. 168).

In the main opinion by Somerville, *J.,* it is said:

> "So, a party who either obtains or defeats a judgment, by pleading or representing anything in one aspect, is generally held to be estopped from giving the same thing another aspect, in a suit founded upon the same subject matter,—Herman on Estop. Par. 165" (77 Ala. 165).

In *Denton* v. *Erwin,* 5 La. Ann. 18, the Court say:

> "A man should not be permitted to deny what he had solemnly acknowledged in a judicial proceeding, nor to shift his position at will, to a contradictory one, in relation to the subject matter of litigation, in order to frustrate and defeat the actions of the law upon it" (5 La. Ann. 22).

In *Del Bondio* v. *Insurance Co.,* 28 La. Ann. 139, the Court say:

> "After having gained an advantage by judicially alleging and maintaining that the contract was valid in the suit decided, this defendant will not be listened to when setting up the nullity of the same contract" (28 La. Ann. 140).

In *Walker* v. *Walker,* 37 La. Ann. 107, the Court say:

> "It is well established that one is bound by his judicial allegations to such extent that he will not be

> heard to contradict them. *School Bd. Concordia* v. *Hernandez,* 31 Ann. 158; *Watkins* v. *Carthon,* 33 Ann. 1198; *Folger* v. *Palmer,* 35 Ann. 744. Certainly he cannot recover on an alleged state of facts which is so counter to those set up in a previous suit that if the one be true the other must necessarily be false. Wells on *Res Adjudicata,* secs. 9 *et seq.*" (37 La. Ann. 107-8).

In *Galt* v. *Provan,* 131 Iowa, 277, the defendant insisted that no recovery could be had upon the contract sued upon because the consideration had failed by breach of a condition precedent, but the court said:

> "It appears that, after knowledge of the claimed breach of condition, defendants set up this contract and succeeded in defeating the previous action brought by plaintiff, by reason in part at least of the agreements contained therein. See *Galt* v. *Provan,* 108 Iowa, 565. Having used the contract in that case, and insisted upon its validity for the purpose of defeating plaintiff, it cannot now be heard to say that the contract is not in force. Defendants will not be allowed to assume such inconsistent positions. *Kramer* v. *Kramer,* 68 Iowa 567; *Scott* v. *Lutcher,* 44 Iowa 572; *Hyatt* v. *B. C. R. & N. R. R.,* 68 Iowa 662; *Shropshire* v. *Ryan,* 111 Iowa 677; *Riegel* v. *Ormsby,* 111 Iowa 10" (131 Iowa 280).

In *Ogden* v. *Rowley,* 15 Ind. 56, the defendant in a suit upon an award set up facts to impeach it for mistake, misconduct and fraud. Plaintiff replied that in a prior suit pending in favor of the plaintiff against the defendant for the same cause of action and subject matter upon which the award now sued on was founded, the defendant had pleaded the award now sued on and thereby defeated said action. The Court say:

> "The award was, by the defendant, treated as valid, in the answer setting it up as a defense to the former action . . . Having had the benefit of it, as a valid award, in that suit, he should not now be permitted to impeach it. *Washington Hall Co.* v. *Stipp,* 5 Blackf. 473,—2 B. Monroe, 257,—2 Sumner's R. 589" (15 Ind. 58).

In *Moser* v. *Phila. H. & P. R. R. Co.,* 233 Pa. 259, the Court say:

> " 'It is settled law', says Trunkey, *J.,* in McQueen's App. 104 Pa. 595, 'that a man who obtains or defeats a judgment by pleading or representing in one aspect, will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject.' To the same effect will be found *Campbell* v. *Stephens,* 66 Pa. 314; *Aronson* v. *Cleveland & P. R. R. Co.,* 70 Pa. 68. The general rule in such cases is thus stated in 16 Cyc. 799, 'A claim or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same, and the same questions are involved' " (233 Pa. 269-270).

In *Hodges* v. *Winston,* 95 Ala. 514, it was held that when the defendant, claiming under a conveyance from a judgment-debtor, has successfully excluded evidence assailing the conveyance for fraud, on the ground that the property conveyed was the homestead of the debtor, he is precluded from afterwards contending that it was not in fact the debtor's homestead. The Court say:

> "Having obtained a substantial advantage by taking and successfully maintaining the position that the lands in question constituted a homestead, they (the defendants) estopped themselves from claiming, on the same state of evidence, that they were not a homestead. They could not support one position of defense by claiming that the lands constituted a homestead, and at the same time obtain the advantage of another position which involved a denial of the homestead character of the land. A defendant who, for the purpose of maintaining a defense, has deliberately represented a thing in one aspect, can not be permitted to contradict his own representation by giving the same thing another aspect in the same case.—*Caldwell* v. *Smith,* 77 Ala. 157; *Hill* v. *Huckabee,* 70 Ala. 183; *Herman on Estoppel* (4th Ed.), 687." (95 Ala. 517.)

The Government can not claim exemption from the rule above discussed.

In *United States* v. *Stinson, et al.,* 125 Fed. 907, affirmed 197 U. S. 200, the Court say:

> "But when the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. *Carr* v. *United States,* 98 U. S. 438, 25 L. Ed. 209. The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to a government as well as to individuals. *Chope* v. *Detroit Plank Road Company,* 37 Mich. 195, 26 Am. Rep. 512; *Commonwealth* v. *Andre,* 3 Pick. 224." (125 Fed. 910.)

In *Walker* v. *United States,* 139 Fed. 409, the Court say:

> "When the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound, as an individual would be, by his own acts, or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them." (130 Fed. 412.)

In *State of Iowa* v. *Carr,* 191 Fed. 257, the Court say:

> "But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself, constitute a bar to suits and claims of a state or of the United States, yet, when a sovereign submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances." (191 Fed. 266.)

X.

THE FINAL DECREE IN THE CASE OF THE UNITED STATES v. UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, AND OTHERS, IS A BAR TO ALL RELIEF SOUGHT BY THE GOVERNMENT IN THIS CASE.

The main purpose of that suit was to remove all restraint of trade and commerce which had been imposed by the defendants, or any of them, and which affected the Central Pacific and connecting transcontinental lines on the one hand, and the Sunset line on the other.

Such restraint was alleged to have been accomplished, first, by the Union Pacific Railroad Company obtaining control of the Southern Pacific Company through the purchase of the capital stock of that company in the year 1901. The petition described the system of rail and steamship lines operated and controlled by the Union Pacific Railroad Company, also the system of rail and steamship lines operated and controlled by the Southern Pacific Company, alleging that these two systems were competitive for the transportation of large quantities of freight and passengers between the Atlantic seaboard and the Pacific coast, and between various other points, which competition had been suppressed by the Union Pacific Railroad through its control of the Southern Pacific Company.

The petition further alleged that the Southern Pacific Company was the owner of all the capital stock of the Central Pacific Railway Company, which company, in turn, was the owner of the line of railroad extending from San Francisco to Ogden, Utah, and that by virtue of such ownership the Southern Pacific Company, in all respects, controlled the management and operation of the Central Pacific Railway Company.

The Southern Pacific Company, in its answer, admitted its ownership of the capital stock of the Central Pacific Railway Company, averring that said company succeeded to the ownership of the railroad from San Francisco to Ogden, with other lines formerly owned by the Central Pacific Railroad Company, and that at all times since January 1, 1901, the Southern Pacific

Company possessed and operated all the railroads of the Central Pacific Railway Company by virtue of instruments of lease theretofore made and entered into, this being the lease of Central Pacific Railroad Company to the Southern Pacific Company, dated February 17, 1885, copy of which was annexed to the petition in the present case and marked Exhibit A.

While a special prayer for relief was made as against the control of the Southern Pacific Company by the Union Pacific Company, the Government, also, by such petition, prayed for such relief as the nature of the case might require and to the court seem proper in the premises.

The proceedings in the Union Pacific suit were, briefly, as follows: after the taking of testimony and the hearing, the Circuit Court entered its decree dismissing the petition and denying the Government any relief whatever. Upon appeal to the Supreme Court of the United States, that court reversed said decree only upon the point that the control of the Southern Pacific Company by the Union Pacific Railroad Company was illegal and in violation of the Act of July 2, 1890; but as to all other matters the Supreme Court of the United States said, "We find no reason to disturb the action of the court below", and as to such matters the final decree was against the Government and in favor of the defendants.

In the case at bar, the Government's petition sets forth the lines of railroad owned by the Central Pacific Railway Company, which include the main line from San Francisco to Ogden; also, the lines of railroad controlled by the Southern Pacific Company through stock ownership and as lessee, which include the line from San Francisco to New Orleans, known as the Sunset line. The Government's petition also sets forth the stock ownership and control of the Central Pacific Railway Company by the Southern Pacific Company and the lease of the Central Pacific lines to the Southern Pacific Company, dated February 17, 1885. The petition also shows the competitive traffic which might have moved, either by the Central Pacific line and connections through Ogden, or by the Sunset line, and avers that the ownership by the Southern Pacific Company of the capital stock of the Central Pacific Railway Company and its lease of the properties of that company result in

a suppression of competition for said traffic, and that therefore the Southern Pacific Company's domination, management and control of the Central Pacific Railway Company constitute a combination in restraint of interstate and foreign trade and commerce and a monopolization thereof in violation of the Act of July 2, 1890.

The principal relief prayed for is that the Southern Pacific Company be required to dispose of the capital stock of the Central Pacific Railway Company and to cancel and relinquish its lease, control, management and operation of the lines of that company.

It thus appears that the Government, in the case at bar, is seeking a decree declaring that the ownership by the Southern Pacific Company of the capital stock of the Central Pacific Railway Company and its lease of the properties of that company, and its domination, management and control thereof are in violation of the Act of July 2, 1890.

In Paragraph X, of the answer, the Southern Pacific Company and the Central Pacific Railway Company plead, as a special defense to the action, the estoppel of the decree in the Union Pacific suit.

The issue in the present suit could have been litigated and adjudicated in the Union Pacific suit and all suitable relief given there which could be obtained here. The Southern Pacific Company was a party to the Union Pacific suit and was the only necessary party defendant in granting the relief which is sought in the present case. The Central Pacific Railway Company was not a necessary party, but, if it had been, its absence would not affect this question (*Curtiss* v. *Trustees of Bardstown,* 29 Ky. (6 J. J. Marsh) 538). There was nothing in the way of making it a party: in fact, that company was made a party defendant to the Union Pacific suit before final decree.

All the evidence which has been introduced by the Government in the case at bar would have been admissible in the Union Pacific suit to show, if that were true, that the ownership and control of the Central Pacific Railway Company by the Southern Pacific Company created an unlawful combination in restraint of trade and commerce under the Act of July 2, 1890.

The "subject matter" or "cause of action" in the Union Pacific suit was to free two competing transcontinental routes, viz., the Ogden route and the Sunset route, from the unlawful restraint of trade and commerce which had been imposed upon them by the defendants, or any of them, and whether such combination or restraint was created by one or more transactions of the defendants, or any of them, the "subject matter" or "cause of action" was *one thing,* not to be divided or presented piecemeal for the purpose of litigation.

To allow the Government in this case to litigate the questions which were *sub judice* in the Union Pacific case, is to violate well settled principles of law which forbid litigation by piecemeal and require litigants to present fully their claims upon the subject matter in question, failing in which a decree against such litigants is a conclusive adjudication barring any further litigation by them upon the "subject matter" or "cause of action" in the first suit.

This rule has been followed by the Supreme Court of the United States in a long line of cases, beginning with *Stockton* v. *Ford,* 18 Howard, 418, where the Court said:—

> "One of the questions now sought to be agitated again is precisely the same as this one in the previous suit; namely, the right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied; namely, the equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if tenable, furnishes no reason for another litigation" (18 How. 420).

In *Aurora City* v. *West,* 7 Wallace, 82, it is said:

> "Courts of Justice, in stating the rule, do not always employ the same language; but where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam,* and

the former judgment in such a case is conclusive between the parties.

"Except in special cases, the plea of *res judicata,* says Taylor, applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" (7 Wallace, 102).

In *Beloit* v. *Morgan,* 7 Wallace, 619, Mr. Justice Swayne said, quoting from *Henderson* v. *Henderson,* 3 Hare, 115:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

To this, Mr. Justice Swayne adds:

> "A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction" (7 Wallace, 623).

In *Wiggins Ferry Co.* v. *O. & M. Ry.,* 142 U. S. 396, it is stated:

> "Where the judgment in the former action is upon demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings or decided, and does not operate as a bar to a second suit for other breaches of the same covenants, although if the judgment be upon pleadings and proofs, the estoppel extends not only to what was decided, but to all that was necessarily involved in the issue. *Wash. & Alexandria Packet*

Co. v. *Sickles,* 24 How. 333; s. c. 5 Wall., 580; *Gould* v. *Evansville, &c., Railway,* 91 U. S. 526; *Boyd* v. *Alabama,* 94 U. S. 645; *Russell* v. *Place,* 94 U. S. 606, 608; *Morrell* v. *Morgan,* 65 California, 575" (142 U. S. 410).

In *Cromwell* v. *County of Sac,* 94 U. S. 351, the Court held that where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered, but the Court reiterated the rule that a judgment is a bar or estoppel against the prosecution of a second action upon the same claim or demand, such judgment being a finality "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose" (94 U. S. 352).

The case of *United States* v. *California & Oregon Land Company,* 192 U. S. 355, is very much in point. In that case it was decided that a decree rendered upon a bill in equity brought by the United States under the act of March 2, 1889, to have patents for certain lands declared void and to establish the title of the United States to the land was a bar to the subsequent bill brought against the same defendants to recover the same land on the ground that it was excepted from the original grant as an Indian reservation. In that case the Court said:

> "On the general principles of our law it is tolerably plain that the decree in the suit under the foregoing statute, would be a bar. The parties, the subject matter and the relief sought all were the same. . . . Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. See *Werlein* v. *New Orleans,* 177 U. S. 390, 400, 401. The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this,

as in the former suit, it seeks to establish its own title to the fee.

It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi. Phosphate Sewage Co.* v. *Molleson,* 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. S. C. 4 App. Cas. 801, 820. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter* v. *Beale,* 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad,* 2 Allen, 331; *Freeman, Judgments,* 4th Ed., Sec. 238, 241; and, *a fortiori,* he cannot divide the grounds of recovery. Unless the statute of 1889 puts the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was dismissed was barred as to all by the decree. *Werlein* v. *New Orleans,* 177 U. S. 390; *Bienville Water Supply Co.* v. *Mobile,* 186 U. S. 212, 216, 217; *Hoseason* v. *Keegan,* 178 Massachusetts, 247; *Wildman* v. *Wildman,* 70 Connecticut, 700, 710; *Sayers* v. *Auditor General,* 124 Michigan, 259; *Foster* v. *Hinson,* 76 Iowa, 714, 720; *State* v. *Brown,* 64 Maryland 199; *Boyd* v. *Boyd,* 53 App. Div. N. Y. 152, 159; *Shaffer* v. *Scuddy,* 14 La. Ann. 575; *Henderson* v. *Henderson,* 3 Hare. 100, 115.

. . . . . .

But if the United States was at liberty to state all its grounds for claiming the land, it was bound to do so on 'the same principles and rules of jurisprudence as other suits in equity are therein tried' by which principles and rules, as has been shown, it was expressly enacted that the case should be tried. . . . It would not be consistent with the good faith of the United States to attribute to it the intent to keep a concealed weapon in reserve in case these suits should fail" (92 U. S. 357-360).

It is needless to cite other decisions of the Supreme Court of the United States to the same effect, also innumerable cases which could be cited from the District and Circuit Courts of the United States and from the different State courts which unanimously sustain the rule above stated. But perhaps it is

worth while to quote from the decision of the United States Circuit Court of Appeals, Ninth Circuit, in the case of *Stone* v. *United States,* 64 Federal Reporter, 667, where Judge Hawley states this rule in the following language:—

> "It is also well settled that the plea of *res adjudicata,* except in certain special cases, is not only conclusive upon the questions which the courts were required to form an opinion and pronounce judgment on, but upon every point which properly belonged to the subject of litigation, and which was, or might properly have been, brought forward in the former suit. One of the safest rules for courts to follow in determining whether a prior judgment between the same parties, concerning the same matters, is a bar, is to ascertain whether the same evidence which is necessary to sustain the second action, if it had been given in the former suit, would have authorized a recovery therein" (64 Fed. 670).

In *Detroit Ry.* v. *Mich. Comm.* (1914), 235 U. S. 402, 406, Mr. Justice Holmes declares:

> "We must assume that the plaintiff was bound to present its whole case. *Calaf* v. *Calaf,* 232 U. S. 371, 374."

Applying the rule thus stated to this case, how can we escape the conclusion that the decree in the Union Pacific case is a bar to the relief sought in the present case? Undoubtedly the Government might have offered in the Union Pacific case the evidence which has been advanced by it in this case, and it could have secured in the Union Pacific case any relief to which that evidence would entitle it in this case.

The Government cannot escape the decree in the Union Pacific suit by any technical refinements or sophistication intended to show that it had really two distinct causes of action, one based upon the control of the Southern Pacific Company obtained by the Union Pacific Railroad Company through purchase of stock, and the other based upon the control obtained by the Southern Pacific Company over the Central Pacific Railway Company by purchase of stock and lease of road. Even if these two transactions might have been dealt with separately and independently, and the Government might have elected to confine the Union Pacific case strictly to the first

transaction, the answer is, that it did not do this; that by the allegations in its petition and the parties joined as defendants, the Government presented its case so comprehensively that it could have secured full and complete relief as to both of these transactions, and as the cause of action or relief sought affected one thing, namely, restraint of competition between these two transcontinental routes prohibited by the Anti-Trust Act, it was most proper and most desirable that the Government should present its whole case so far as it existed against these defendants in the Union Pacific suit.

How can the Government now argue that it could not, or did not, by its petition in the Union Pacific case present its cause of action so that full relief could be had by it as to each of the transactions above mentioned? Certainly, there was no thought in the minds of the then Attorney General of the United States or his associate counsel, who drew the petition in the Union Pacific case, that there was anything in the way of the Government presenting many different, separate and disconnected transactions upon which it might recover appropriate relief. For example, in the Union Pacific case the petition set forth not only the acquisition and control of the Southern Pacific by the Union Pacific through purchase of its stock and also the like control over the Central Pacific Company by the Southern Pacific Company through ownership of stock, but the petition further set forth that the defendants had acquired and were the owners of a large amount of the capital stock of the Northern Pacific Railway Company and also of the Great Northern Railway Company, which stocks were illegally held by the Oregon Short Line Railroad Company for the purpose of suppressing competition theretofore existing between the various railway systems and water lines described in the petition. And, further, the petition set forth that the defendants Clark and Harriman, for the purpose of preventing competition between the San Pedro, Los Angeles & Salt Lake Railroad Company and the Union Pacific system, had made certain contracts by which the capital stock of said last-mentioned railroad company was divided in equal parts between said Clark and said Harriman; and the petition further set forth that the defendants Harriman and others had made

large purchases of stock of the Atchison, Topeka & Santa Fe Railway Company, which stock, or a large part thereof, had been acquired by the Union Pacific Railroad Company with the result that the competition between the systems of railways controlled by the Union Pacific Railroad Company and said Atchison, Topeka & Santa Fe Railway Company had, to a large extent, been eliminated, and that the defendants caused the Southern Pacific Company to abandon extensions, improvements and additions to their interstate railway in the State of California, and also, the Atchison, Topeka & Santa Fe Railway Company had been in the same manner caused and induced to abandon extensions and additions to its interstate railway lines in California and that said extensions, so projected, had been amalgamated and placed in a corporation known as the Northwestern Pacific Railroad Company, the stock of which was owned in equal parts by the Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company. And as to all these transactions involving the Northern Pacific Railway Company, the Great Northern Railway Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, and the Atchison, Topeka & Santa Fe Railway Company, the petition prayed special relief by decree adjudging the acquisition of the stocks above mentioned to be illegal and to dissolve the combinations which had been created thereby. As to all these transactions the Government introduced voluminous testimony and urged the Court to grant the relief prayed for in the petition.

This case presents in exaggerated form an effort by the Government to litigate matters which were essentially a part of the subject matter or cause of action in the Union Pacific case. The court could not have determined the whole case presented there without considering these matters, and under all the authorities, they are disposed of by the decree in that case.

XI.

NO VIOLATION OF THE PACIFIC RAILROAD LAWS IS PRESENTED IN THIS CASE.

The Government contends that each of the constituent roads franchised under the Pacific Railroad Laws must work actively and exclusively for one another and make a one hundred per cent. interchange at junction points. There are many replies to this contention:

(*a*) The conditions complained of as violating the Pacific Railroad Laws have been in existence for more than thirty years (1883 to 1914), and have been unchallenged all these years.

(*b*) No Committee of Congress or any Attorney General until now has ever claimed that the constituent roads above mentioned are required by the Pacific Railroad Laws to work exclusively for one another or to make a one hundred per cent. interchange at junction points.

(*c*) Indeed, the Pacific Railway Commission (D. Ex. 31, p. 115) investigated the question whether the Sunset-Gulf route was in point of fact diverting business from the Central Pacific and Union Pacific, and it reported (p. 178, *supra*) that no such diversion had occurred. At that time the Southern Pacific Company was operating the Central Pacific lines under its lease. It did not occur to the Pacific Railway Commission that the Central Pacific was under obligation to work actively and exclusively for the Ogden route and to make a full interchange at that point, for otherwise, instead of investigating the question as a matter of fact, the Commission would have reported to Congress that there was a violation of the Pacific Railroad Laws for the reason now urged by the Government. The very fact that the Commission did not so report is cogent argument that the Pacific Railroad Laws are not open to the construction which the Government here seeks to put upon them.

(*d*) The Union Pacific Railroad Company, whose rights are said to be violated by the failure of the Central Pacific to work actively and exclusively with a view to procuring all possible traffic for the Ogden route and its delivery to the Union Pacific at Ogden, has never during the thirty years of the Sunset-Gulf route's existence, made any such claim or awakened to the possibility that the Pacific Railroad Laws were open to any such construction.

(*e*) In fact, the Union Pacific has proceeded upon the very opposite construction, notably in the acquisition of the Oregon Short line and the San Pedro line.

(*f*) Indeed, in the Union Pacific case, the Company argued that it had acquired the Southern Pacific to avoid being bottled up by the Central Pacific at Ogden; an argument totally inconsistent with the idea that the Central Pacific was bound to work actively and exclusively for the Ogden route and to make a full interchange of business with the Union Pacific at that point.

(*g*) It never occurred to the Attorney General, in the Union Pacific case, to argue that the question of the Union Pacific being bottled up was conclusively answered by a requirement of the Pacific Railroad Laws, whereunder the Central Pacific was bound to work actively and exclusively for the Ogden route and to make a full interchange of business with the Union Pacific at that point.

(*h*) It does not seem to have occurred to any of the Circuit Judges who sat in the Union Pacific case, that the argument of the Union Pacific that it had bought the Southern Pacific to prevent the Central Pacific from bottling it up at Ogden could be fully or at all answered by the suggestion that under the Pacific Railroad Laws the Central Pacific was bound to work actively and exclusively for the Ogden route and to make a full interchange of business with it at that point.

(*i*) It never occurred to the Supreme Court that under the Pacific Railroad Laws the Central Pacific was bound to work actively and exclusively for the Ogden route and to make a full interchange at that point with the Union Pacific. On the

contrary, in meeting the argument of the Union Pacific that it wished to avoid being bottled up by the Central Pacific at Ogden, the Supreme Court employed several arguments less cogent than the one now offered by the Government in its novel construction of the Pacific Railroad Laws. If it had occurred to the Supreme Court that this was the meaning of the Pacific Railroad Laws, it would have found a very short cut by way of reply to the Union Pacific's argument that it might be bottled up by the Central Pacific at Ogden.

In *Chicago, etc., R. R.* v. *R. R. Commission* (1915), 35 Sup. Ct. Rep. 560, a point was raised in the argument in the United States Supreme Court which had not been submitted to the Supreme Court of Wisconsin. Speaking of this point, the court said (p. 565, top of second column):

> "If the Supreme Court of the State had so thought, *it would have accepted that short way to the decision of the case, and not have occupied itself with other and more complex questions.*"

(*j*) A number of the officers of the Union Pacific were called as witnesses in the case at bar, but it does not seem to have occurred to any one of them that the Central Pacific was bound to work actively and exclusively for the Union Pacific nor is there any suggestion or complaint by any of them that the Central Pacific is remiss in its treatment of the Union Pacific.

(*k*) The Interstate Commerce Act, and its amendments, in terms, either direct or authorize the Interstate Commerce Commission to require of the railroads of the country generally all that is required of the Pacific Railroads by the laws under which they were created; and no one will contend that it requires connecting carriers generally to work actively and exclusively for one another and to make a full interchange at junction points.

(*l*) The original English Railway and Canal Traffic Act of 1854 (17 and 18 Vict., Chap. XXI) provided that:

> "Every railway company and canal company and railway and canal company having or working rail-

> ways or canals *which form a continuous line of railway or canal or railway and canal communication;* . . . shall afford all due and reasonable facilities for receiving and forwarding all traffic arriving by one of such railways or canals by the other."

The Pacific Act of July 2, 1864 (13 Stat. 356) obligated each of the companies

> "to afford and to secure to each equal advantages and facilities as to rates, time and transportation."

It may be seen that the object of the English Act of 1854 and of our own Act of 1864 was two-fold:

(1) To insure the use and operation of connecting lines as "one continuous line"; and

(2) To compel each connecting carrier in the "continuous line" to afford equal facilities for receiving and forwarding traffic coming from another of the lines.

The idea that these provisions respecting the handling of traffic had anything to do with the obligation to contribute to the revenues of the connecting lines, seems never to have occurred to the English authorities nor, indeed, until this action, to the American authorities.

(*m*) The Pacific Railroad Laws were not intended to compel each of the constituent Pacific roads to contribute traffic for the common benefit, but were designed to secure the appropriate handling of the traffic by the requirement of adequate transportation facilities.

(*n*) The Government on its own behalf is interested in the service to be obtained by one continuous line from the Missouri River to the Pacific Ocean, and it is also interested in securing "good service at fair rates" (Pet. Br. p. 282) for the public. It is not interested in the question of the revenues of the carriers as such. Although it was once a creditor of these roads, it ceased to be so over fifteen years ago; and the provision for a continuous road and for equal facilities as to rates, time and transportation had nothing to do with increas-

ing the earnings of the roads indebted to it. From all this, it follows that if the Central Pacific were guilty of discrimination against the Union Pacific (in matters which did not involve the interests of the Government or of the public generally), there certainly would be no cause of action in the Government, but the alleged discrimination would have to be redressed at the suit of the Union Pacific.

(*o*) In dealing with the arguments of the Government to the effect that the Southern Pacific has discriminated through the Central Pacific against the Union Pacific, it is not to be forgotten that the Union Pacific controlled the Southern Pacific and consequently the Central Pacific, from 1901 to 1913. Failure to note this fact gives rise to deductions which would not otherwise be made. Take the argument of the Government in relation to the discrimination against the Union Pacific in the matter of traffic in Nevada wool (Pet. Br. pp. 99 and 216). The traffic conditions which controlled the movement of this freight were fully explained by Mr. Dunne in the oral argument. This alleged discrimination in the shipment of Nevada wool was going on when the Union Pacific acquired control of the Southern Pacific, *but the routing of the wool under Union Pacific direction remained unchanged for eight years thereafter.* It would seem that if this constituted discrimination against the Union Pacific, the Union Pacific would have corrected it. The rational explanation of the routing of the wool is given in Mr. Dunne's argument, where the routing is shown to have been controlled by sound and business-like principles.

(*p*) It is argued by the Government that the Central Pacific lagged behind the Union Pacific in service (Pet. Br. 197) and also that there was a marked improvement in the condition of the Central Pacific after the merger of 1901 compared with its condition before that time (Pet. Br. pp. 87, 89-91, 107, 198-199). It is to be remembered, however, that the Central Pacific debt was not settled until 1899, and that before that settlement, there could have been no certainty as to the future of the company. The lines were mortgaged and no one could forecast the result of a reorganization. The uncertainties of the situation undoubt-

edly crippled or restricted the credit of the company so that it would have been difficult, if not impossible, to procure the money necessary to build up the property. It would be very natural, therefore, to expect that when the property was freed, it would receive the full attention which an unencumbered line would be sure to have when its future was secure. The improvement in the Central Pacific is not to be attributed to the Union Pacific, although this improvement may have commenced contemporaneously with the Union Pacific's control over the line. This was a mere coincidence. The fact of larger importance was that the Central Pacific debt had been readjusted and the company reorganized, and that the proprietors looked forward to long and sustained control.

(*q*) Next, it is not suggested that the Central Pacific is in any manner remiss in respect of the handling of traffic originating on its lines and destined for the Union Pacific or in its treatment of traffic coming on to its own lines and destined for or actually delivered to the Union Pacific; indeed, Judge Lovett testified that he could not say that the Central Pacific operation would be improved if placed in other hands (I R. 297; V. R. 486). The following evidence by Mr. Spence, fully fortified in other portions of his testimony and uncontradicted, makes clear that the Central Pacific is not remiss in any particular. He testifies (V. R. 1045-1046):

> "Going back, now, to the regular order of your testimony, what are the relations between the Union Pacific and the Southern Pacific in respect to the through route via Ogden?
>
> "A. There are but few connecting lines whose relations are as close and co-operative. There are no connecting lines whose relations are closer and more co-operative than the relations between the Union Pacific and the Southern Pacific. The lines are operated as one connected, continuous line.
>
> "Q. What about the personal relations between the officers of those lines in respect to mutual satisfaction as to the nature and extent of the co-operation?
>
> "A. They are exceedingly cordial and co-operative. I do not know of a complaint on either side, and I know of no cause for complaint on either side.
>
> "Q. What arrangements have you, for instance, with

them in regard to advertising the Ogden through route?

"A. We joined the Union Pacific in advertising the through train service between Chicago and San Francisco by the annual creation of a joint advertising fund, to which the lines contribute on a *pro rata* basis. Very much the largest share of that fund is spent in westbound advertising, and is placed in the hands of the Union Pacific for that purpose.

"Q. They spend the fund to which you contribute as they see fit?

"A. Yes.

"Q. Can you give us the approximate amount annually which is expended for this westbound advertising?

"A. The amount spent, between Chicago and San Francisco, during the current year will be about $140,000.

"Q. What have been the results of this co-operative effort to afford the public a through line via Ogden? What kind of a line is that through line thus created?

"A. Briefly stated, the results of this co-operation have been to establish the best through transcontinental line, taking passenger and freight service together, across the country.

"Q. Of all the all-rail lines that you have mentioned, in your opinion, the Ogden route is the best?

"A. Yes."

Mr. Schumacher testified (I R. 173):

"There may be connections that work 100 per cent. with each other. The Central and Union do not, but aside from their Sunset territory, I do not believe two lines could work any more closely together than the Union and Southern or Central."

(*r*) In short, the Pacific Railroad Laws obligated the companies (which were several in number, *v.* Map I, Appendix) constituting the Pacific Railroads so to operate and use their roads that in use and operation the roads would be "one connected, continuous line". Each of the companies was prohibited from discriminating in favor of or against the roads or business of any of the other of the companies, and was enjoined to accord to each of the other companies "equal facilities *as to rates, time and transportation*". When we consider that the Act of 1862 was passed shortly after the outbreak of the Civil War, when

a through line of transportation to the Pacific Ocean was desirable for the transportation of troops and munitions of war, the meaning of the provisions of the Pacific Railroad Laws is obvious. The Government was not interested in the apportionment of freight or earnings among the several roads. It was interested only in securing such treatment by each road of the others as would assure unhindered through transportation. To accomplish this end, the Pacific Railroad Laws used plain, simple language. They required each of the Pacific Railroads to accord to each of the others "equal facilities as to rates, time and transportation": terms having no relation to the apportionment of traffic or earnings or community interest in revenues, but, on the contrary, peculiarly appropriate to the subject of adequate transportation facilities, and to that subject alone.

XII.

THE CONSTRUCTION WHICH THE GOVERNMENT ATTEMPTS TO PUT UPON THE PACIFIC RAILROAD LAWS IS INCONSISTENT WITH THE POSITION WHICH HAS ALWAYS BEEN TAKEN BY THE THREE DEPARTMENTS OF THE GOVERNMENT CONCERNING THE CONTROL OF THE CENTRAL PACIFIC BY THE SOUTHERN PACIFIC.

In no instance, except in the case at bar, has the argument ever been put forward in any department of the Government that the Pacific Railroad Laws required the constituent roads to work actively and exclusively for one another and to make full interchange at the junction points. On the contrary the opposite position has been taken by the three departments of the Government. This matter is sufficiently covered in Points VII and XI and need not be considered further.

XIII.

EVEN THOUGH A VIOLATION OF THE PACIFIC RAILROAD LAWS WERE PROVED IN THE CASE, THE REMEDY WOULD BE BY INJUNCTION OF RESTRAINT OR OF COMMAND TO COMPLY WITH THE PROVISIONS OF THE ACTS.

United States v. *Great Lakes Towing Co.*, 208 Fed. 733 (1913), decides:

> "Where the illegality of the combination results alone from purely administrative conditions, which may be effectually eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute."

The Court also said (p. 658) that, under such circumstances, the remedy

> "is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate."

XIV.

THERE IS NO EVIDENCE WHATEVER OF ANY ATTEMPTS AT MONOPOLY OR MONOPOLISTIC PRACTICES.

The argument of counsel for the Government in their brief is simply to the point that these railroads had a monopoly because they pioneered the field of railroad building in California. This does not give rise to a monopoly in the invidious sense, otherwise every pioneer would be a monopolist.

XV.

IT IS IMPOSSIBLE TO DISMEMBER THE SOUTHERN PACIFIC-CENTRAL PACIFIC SYSTEM WITHOUT SUBSTANTIAL DETERIORATION IN THE PUBLIC SERVICE.

We refer to our treatment of this matter at pages 195-201 of this brief. It is our contention that the impairment of the public service which would result from the dismemberment of the system here sought to be torn asunder, may be relied upon by us

(*a*) As convincing proof that a system so welded together as this must necessarily have been built up as a normal growth.

(*b*) That such impairment of service is a full defense in equity.

(*c*) That it is an item in the defense that there is no undue restraint of commerce, and

(*d*) That it is equally an item in the defense of estoppel by conduct.

If this system cannot be torn apart without inflicting substantial and serious injury upon the public, it must be because the present condition has obtained for many years and grown into the needs of the communities served by it. If, therefore, it should prove to be true, as we contend, that substantial and serious public injury will result from dismemberment, that should be a full answer in equity. Again we say that the public injury is an item to be taken into account in the defenses that there is no undue restraint of commerce, and that the Government is estopped by its conduct.

Again, the impairment of the public service and the impossibility of dismemberment are established by the circumstance that the Central Pacific and Southern Pacific with full disposition to contract for a readjustment of the status of the Central Pacific were unable to do so in a manner consistent with the public good, as determined by the Railroad Commission of California. The whole matter may be summed up in the language

attributed to the President of the University of California, when the question of the separation of the Central Pacific and Southern Pacific was discussed in 1913 and 1914, as follows:

> "The Central and Southern Pacific Railroads are so thoroughly bound together that no man can foresee the result of tearing them asunder" (*The Outlook,* Vol. 106, p. 609).

We indicate in the following list, some of the necessary incidents of dismemberment, for which some sort of adjustment will have to be attempted.

(*a*) The problem of the Oakland Mole;

(*b*) The problem of the Tehama-Oregon Line;

(*c*) The loss of one of the Valley Lines;

(*d*) The breaking up of the State into two- and three-line hauls;

(*e*) The destruction of a one-line haul between Oregon and California;

(*f*) The destruction of a one-line haul between many parts of California and Arizona;

(*g*) The destruction of a one-line haul between Oregon, California and Arizona;

(*h*) The destruction of a one-line haul between California and Nevada;

(*i*) The destruction of a one-line haul between Oregon and Nevada;

(*j*) The impairment of the Central Pacific as an interstate carrier consequent upon the loss of all Southern Pacific rails as feeders;

(*k*) The impairment of the Sunset-Gulf route as an interstate carrier on account of the loss of all Central Pacific rails as feeders;

(*l*) And finally, summing up the matter as Mr. Eshleman did: (1) it is very problematical if there would be any benefit to interstate commerce; (2) a practical certainty that there would be great impairment of service in and public detriment of intrastate commerce.

It will not do to say that the difficulties of adjustment will be entirely or almost entirely overcome by negotiations between the lines. If they must negotiate a working arrangement between them, why divorce them? If the lines cannot be separated without an agreement for joint operation, why separate them? Again, if a decree be entered in this case for the separation of the lines, who can say what the course of negotiation may be or what we may expect in respect of the future of either of the properties? We shall not be dealing with an old condition, we shall be hurled into a new one. Neither will it do to say that the Union Pacific and the Southern Pacific were able to make an accommodation agreement; that agreement might have worked out well or poorly, had it not been abandoned. It is enough that the two companies found it impossible to unmerge the Central Pacific without creating a new combination which the Railroad Commission of California would not approve. Moreover, many of the details of the matter had necessarily been left to be worked out in a spirit of good-will. When all is said and done, however, the Union Pacific and Southern Pacific failed to reach an agreement which the Railroad Commission of California would sanction. How can it now be said that arrangements for the divorce of these properties, which have never been operated apart, can be made in keeping with the public interest so as to secure such a divorce as a court of equity would be disposed to decree.

XVI.

IT IS NOT NECESSARY HERE TO CONSIDER WHETHER PROPERTIES WHICH HAD BEEN OPERATED TOGETHER AS ONE FROM THEIR ORIGIN CONTINUOUSLY DOWN TO JULY 2, 1890, UNDER, SAY, TENURES AT WILL, COULD OR COULD NOT THEREAFTER BE LEGALLY UNIFIED BY PURCHASE, LEASE, ETC., BECAUSE AT THE TIME OF THE PASSAGE OF THE ANTI-TRUST LAW, AS WE HAVE ELSEWHERE SHOWN, THE PROPERTIES HERE INVOLVED WERE OWNED BY A SINGLE PROPRIETOR, ALTHOUGH THE TENURE UPON WHICH THE PROPERTIES WERE OWNED WAS A 99-YEAR TERM AND NOT A FEE.

In this connection we may consider two hypothetical cases—(*a*) the unification by executed agreement after the passage of the Anti-trust act, of properties which had *always from their origin been operated as a single unit,* though under executory agreement; and (*b*) the unification by executed agreement after the passage of the Anti-trust act of properties which *at one time were competitive, but which were combined by executory agreement before the passage of the Anti-trust act and then operated as a unit.*

(*a*) Let us suppose a case where properties had been operated together as one from their origin under, for example, tenures at will. We might take, for instance, the case of railroad properties which had been operated for several decades by two brothers without any binding agreement. The question might arise whether a transaction after the Anti-trust law, by which they were for the first time bound together by executed agreement, would be valid. It could be said, and properly, that as they were united from their origin, no violation of the Anti-trust law would be involved in their unification by executed agreement after the enactment of the law, because such a unification did not involve a combination of competitive units. The properties had a *de facto* unification from their origin.

(*b*) Let us assume now the second hypothesis and take, for instance, a case of railroad properties which at one time in their history had been competitive units but were later operated under conventional arrangement before the passage of the Anti-trust act, and then, after the passage of the Act, joined by an executed agreement. In this case it would be argued that *U. S.* v. *Trans-Missouri* (1897), 166 U. S. 290, controlled, because at one time the properties had been competitive units.

The present case, however, is quite excluded from the scope of either of these hypothetical cases, because the properties concerned were legally unified by a lease executed in all respects, so far as vested interest in the property is concerned, five years before the passage of the Anti-trust act.

XVII.

CONSIDERING THAT (a) THESE LINES WERE OPERATED AS ONE FROM THEIR ORIGIN; AND THAT (b) ON JULY 2, 1890, THE CENTRAL PACIFIC LINES WERE HELD UNDER A 99-YEAR TERM EXPIRING APRIL 1, 1984, THE LEASE OF DECEMBER 7, 1893, WHICH CUT DOWN THE TERM THREE MONTHS, VIZ. TO JANUARY 1, 1984, IS ENTIRELY LAWFUL, LEAVING OUT OF VIEW THE ARGUMENT NEXT TO BE MADE THAT, IF UNLAWFUL, THE LESSEE, SOUTHERN PACIFIC COMPANY, SHALL BE DEEMED TO HOLD AS UPON THE ORIGINAL TERM CREATED BY FEBRUARY 17, 1885.

In this case (*a*) the lines were operated as one from their origin, and (*b*) on July 2, 1890, the Central Pacific lines were held under a 99-year term. There was thus a legal unification. Under those circumstances, it was entirely proper to make another agreement in respect of their legal unification, and even if it had turned out that all rights under the agreement of 1885 were merged in the rights secured by the lease of December 7, 1893, it would by no means follow that no property rights whatever survived. In other words, the validity of the lease of

December 7, 1893, would be sustained by the legal status which existed at the time and which had for its justification the history of the properties and their unification by executed agreement and conveyance for a 99-year term on February 17, 1885.

XVIII.

IF THE LEASE OF DECEMBER 7, 1893, WERE INVALID AS ONE EXECUTED AFTER THE PASSAGE OF THE ANTI-TRUST LAW, THE SOUTHERN PACIFIC COMPANY WOULD NEVERTHELESS BE TREATED AT LAW AND IN EQUITY AS THE HOLDER OF THE 99-YEAR TERM WHICH IT ACQUIRED UNDER THE LEASE OF FEBRUARY 17, 1885, NOTWITHSTANDING THE PROVISION OF CANCELLATION CONTAINED IN THE LEASE OF DECEMBER 7, 1893.

We have just argued (Point XVII) that the lease of December 7, 1893, was valid, although executed after July 2, 1890. We now propose to show that if the lease of December, 1893, was invalid because executed after July 2, 1890, the Southern Pacific would nevertheless hold its 99-year term under the tenure of the lease of February 17, 1885; for it is established that if a lessee shall make a surrender of an outstanding term in consideration of the grant of a new term, and it turn out that for any reason the grant of the new term is invalid, the lessee will be restored to his original estate upon principles somewhat akin to those dealing with failure of consideration and mutual mistake of law. The law would not forbid the enjoyment of the new term and deprive the lessee of the old term which he surrendered in the belief that he was to obtain in its stead a new and valid term.

Let us refer briefly to these leases. The lease of February 17, 1885, was for a 99-year term commencing April 1, 1885. The Southern Pacific entered upon the enjoyment of its 99-year term April 1, 1885, and was in possession when it made the new lease of December 7, 1893. At the time it made the lease of December 7, 1893, the 99-year term would have ex-

pired April 1, 1984. The lease of 1893 provided that the term thereby granted should expire January 1, 1984; in other words, the lease of 1893 cut off three months from the end of the term fixed by the lease of 1885.

The lease of 1893 contains the following clause:

> "Fifth. The agreements between the same parties, dated February 17, 1885, and January 1, 1888, respectively, are hereby canceled, except so far as they relate to operation of said demised premises prior to January 1, 1894, and adjustment of accounts in respect to such operation thereof." (I R. 23.)

Of course the lease of 1893 was simply intended to amend the lease of 1885, but the requirements of conveyancing made it take the form of a surrender of the old term and the grant of a new term. This intent is expressly stated in the lease of March 22, 1894, which amended the lease of 1893. The lease of 1894 provided as follows:

> "Whereas, heretofore and *under date of the 7th day of December, 1893, an indenture was made and entered into* by and between the parties hereto, *revising and changing the then existing agreement of lease between said parties,* as by said indenture, dated the 7th day of December, 1893, by reference thereto will fully and at large appear." (I R. 24.)

In his letter to Senator Gear, dated January 8, 1897 (p. 106, *supra*) Mr. Huntington speaks of the lease of February 17, 1885, as "original lease" and the subsequent lease and amendments as "modification of lease." It is plain that all that was intended was to modify the lease of 1885. It did take the form of a cancelation and the creation of a new term, but as we have already said the law will treat the Southern Pacific Company as enjoying its original term if it made the mistake of supposing that the lease of 1893 would be effective to give it a new term. As we shall show, the rule is that in such a case a lessee will be treated as still holding his original term. If, of course, by subsequent contract that term is cut down, the law will treat it as cut down, and if there are amendments in other respects the law will enforce those amendments.

In other words, it will enforce the intention of the parties as far as it may lawfully do so, and as to those matters in which the parties mistook the law, it will restore them to their position before the mistake of law occurred.

We cite the authorities which deal with this subject and it appears from them that the rule is the same in cases of express surrender as it is in cases of implied surrender. Obviously the rule is applied more frequently in cases of implied surrender; for they occur with greater frequency than cases of express surrender. It will appear from what follows, however, that the rule is the same.

Where a person having a lease for a given term accepts from the lessor another lease covering all or a portion of the unexpired term of the first lease, it is almost universally held that the second lease abrogates the first lease for the reason that through the acceptance of the second lease there was an implied surrender of the first lease. The reason for this is obvious: without a surrender of the first lease the lessor would not have it in his power to grant the second lease. It is, therefore, presumed that the parties intended by the execution of the second lease that the first lease should be surrendered.

This presumed intention has sometimes been supported on the doctrine of estoppel. It is the rule that by his acceptance of a lease the lessee is estopped to deny the title or power of the landlord to make the lease. If, therefore, a lessee accepts a second lease covering a portion of the term of a former lease, he is estopped to deny that the lessor did not have the power to make the second lease and is deemed, therefore, to have intended a surrender of the former lease, which would give to the lessor the power of making the second lease.

It would seem, therefore, that whenever the application of the rule of implied surrender would do violence to the real intention of the parties it should not be indulged, and this is the holding of the authorities.

In *Doe* v. *Poole* (1848), 11 Q. B. 714, 116 Eng. Repr. 641, it is said (p. 642):

> "The doctrine of surrender implied by law was introduced for the purpose of giving effect to the inten-

> tion of the parties: the surrender is presumed for the purpose of making a grant operative which otherwise would be without effect."

In *Lester Agricultural Chemical Works* v. *Selby* (1904), 68 N. J. Eq. 271, 59 Atl. 247, speaking of the rule of implied surrender where a new lease is taken for a longer or a shorter term, or a new lease for the same term is taken upon condition, the court says (p. 249):

> "The reason, obviously, is that the two terms cannot both subsist, in their integrity, at the same time. The lessor cannot effectively give again that which he has already given. And, if both subsisted, double rent would be payable, which would obviously be contrary to the intention of the parties."

In *Van Rensselaer's Heirs* v. *Penniman* (1831), 6 Wend. 569, it is said, quoting from Rob., Frauds, 257 (p. 579):

> " 'This implication of intention from the acts of the parties, is the only legal foundation which will support them (surrenders) in all their extent;' . . .; that is, because the lessor cannot legally execute a second lease of the same premises during the time of a first lease. When the lessee takes a second lease unexplaind, this act admits the power of the lessor, which he cannot legally have without a surrender of the first. The presumption of law, therefore, is, that a surrender has been made. . . . As this presumption of a surrender arises from the acts of the parties; which are supposed to indicate an intention to that effect, it must follow that where no such intention can be presumed without doing violence to common sense, the presumption cannot be supported."

Following the foregoing case is *Flagg* v. *Dow* (1868), 99 Mass. 18.

See also:

Thomas v. *Zumbalen* (1869), 43 Mo. 471.
Schieffelin v. *Carpenter* (1836), 15 Wend. 400, 405.
Smith v. *Kerr* (1888), 108 N. Y. 31, 15 N. E. 70.

Accordingly, courts have in many cases held that a valid second lease did not have the effect of terminating rights under a prior lease, under the doctrine of implied surrender, for the reason that such a result would be contrary to the presumed intention of the parties.

In *Van Rensselaer's Heirs* v. *Penniman, supra,* the owner of certain land in 1766 executed a lease for the term of three lives. The lease contained a covenant that the person eventually entitled to enter should pay the lessee for the value of the improvements made by him. Certain improvements were made upon the land under this lease. On June 27, 1796, the devisee of the owner executed another lease to the lessee for the same three lives. The second lease also contained a provision that the person eventually entitled to enter should pay the lessee for all buildings and improvements made by him on the land. It was subsequently claimed that the first lease had been surrendered through the execution of the second and that the only improvements for which the lessee was entitled to be paid were the improvements made by him after the execution of the second lease. The Court held against this view.

In the opinion it is said (p. 581) :

> "Probably the true object of the second lease was to confirm the prior lease, and to give the lessee greater security for his improvements than he had by the first lease. When the second lease was executed, the lessee had a good title by the first lease to all which it purported to convey. He had, besides, the personal covenant of the lessor for the payment of the improvements. On the supposition that a surrender was intended, the lessee must have intended to abandon all claim for his improvements, and to give up a good title for three lives, on receiving a lease for one of those lives. John I. Van Rensselaer being tenant for his own life only, supposing a surrender made, could not give a valid lease for three lives. At his death his estate terminated, and his heirs would have had a right to enter, although the other lives mentioned in the lease might have been *in esse.* Under these circumstances, and no surrender having in fact been made of the first lease, or of the bond accompanying it, but both being retained by the lessee, I cannot believe that a surrender was intended. The authorities say that the surrender in cases of second leases is pre-

sumed from the intention of the parties. In this case, every circumstance, except the fact of receiving the second lease, altogether rebuts the idea of an intention to surrender the right to compensation for improvements.

If no surrender was intended or made, then the question arises whether both leases are in force, and whether rent is due on each. The only satisfactory answer which I can give is, that the second lease was intended as a confirmation of the first; and the fact that only $30 per annum has been paid since the execution of the second lease, supports such conclusion. I am of opinion that no surrender was made or implied in receiving the second lease."

In *Doe* v. *Poole, supra,* it appeared that a tenant for life with power to lease had, in 1784, demised certain premises for a period of 99 years on three lives, the term to commence immediately after the expiration or other determination of a term of ninety-nine years granted in 1760 on the same premises and also on three lives. For the purposes of the case, it was admitted that the lease of 1760 had terminated and that one of the persons upon whose life the lease of 1784 was dependent was still alive. In 1788 the lessee sold a parcel of the premises to a third person and, for the purpose of effectuating the sale, it was arranged that the tenant for life should execute two fresh leases, the one to the purchaser, the other to the old lessee. Accordingly, the new leases were executed, purporting upon their face to be in consideration of the surrender of the old leases. It was admitted in the case that the lease of 1788 was not a good execution of the leasing power. The tenant for life having died in 1837, an action was brought by the devisees of the remainderman to recover possession. The question for the consideration of the court was, whether, the lease of 1788 being avoided, there had been a valid surrender of the lease of 1784 so far as regarded the premises demised in the lease of 1788.

In the opinion of Erle, *J.,* it is said (p. 642):

"The facts of the present case are remarkable to negative an intention to surrender, unless the new grant should be valid; the object of the parties was to sell a parcel to Acland, and to apportion the render on the residue; and, if the lessee had assented to a demise of the parcel by the lessor to Acland, and he had

accepted it, that would have been a surrender in law of the parcel by such lessee; . . . also a surrender of parcel is no surrender of the residue; . . . And an apportionment could be made without a surrender. The lease therefore of 1788 was unnecessary: it did not substantially alter the lessee's interest in the premises, and was intended to confirm his interest under the subsisting leases. Now it is not possible to conceive a more perverted application of the doctrine of giving effect to the intention of the parties than to hold that an instrument, intended solely to confirm leases, should be effective solely to destroy them."

The court then proceeds as follows (p. 642):

"It has been objected that the surrender must have been absolute if the second lease has been valid for any time, because two valid leases for the same term cannot coexist: but the objection does not arise if the surrender of the first lease be held to be conditional; and this, we think, is the true construction.

That an express surrender may be on condition either precedent or subsequent, is clear upon the authorities, as, if it be with reservation of rent, and conditioned to be void if the rent be not paid; Shep. Touchst. 307. 'A condition annexed to a surrender may revest the particular estate, because the surrender is conditional; Co. Lit. 218 *b*.'

This being so as to express surrenders, we can discover no reason why an implied surrender may not also be taken to be conditioned to be void on a given event. As the surrender is by implication only, it is equally open to imply a conditional or an absolute surrender: and, where the implication of a conditional surrender prevents injustice and gives effect to the real intention of the parties, the true spirit of the law requires that implication to be made, and forbids an implication leading to the contrary consequences. The implication of a condition, that the surrender should be void in case the new grant should fail, appears to us to be free from objection. Indeed, where the terms of a lease import an express surrender solely in consideration of the new grant, we think a construction that such surrender was conditional would be warranted, and would give effect to the intention of the parties."

In *Lester Agricultural Chemical Works* v. *Selby, supra,* the court, dealing with the reasons for holding that the acceptance of a second lease amounts to an implied surrender of a former lease, says (p. 249):

> "This reasoning loses much of its force when applied to grants of terms which are identical. Is it not more reasonable, in cases of this kind, in the absence of evidence to the contrary, to infer a confirmation of the term first demised than a surrender of it? Why should a lessee be deemed, by legal construction merely, to surrender a term, in order instantly to take it back at the same rent, where he still retains possession of the document which confers it? In so far as the contract provisions of the second paper respecting collateral matters—incidents of the term—are inconsistent with those of the first paper, they will, of course, on familiar principles, be held to abrogate them. Turning to the older digests, we find that this idea runs through the cases. In Viner's Abridgment, under the title 'Surrender in Law,' the author first states what shall be deemed surrender, and then what shall not be. Under the latter head are found the following cases: 'If the lessee of a house accept a grant of the custody of the same house, no surrender is presumed.' 'If the King grants an office by patent, acceptance of a new patent of the same office is no surrender of the first.' 'If a lessor leases *de novo* to his lessee and another, it will be a surrender only for a moiety.' The later authorities are to the same effect."

The court then refers to and quotes from *Doe* v. *Poole, supra,* and *Van Rensselaer's Heirs* v. *Penniman, supra.*

Accordingly it was held in the case that, where a lease gave a corporation lessee an option to purchase at the expiration of the term but before such expiration the lessee accepted a new lease which described the premises more specifically, contained a restriction on the use not contained in the first lease, and omitted the option to purchase, there was no surrender of the first lease and that the lessee retained the option to purchase and could compel the specific performance of the option.

In *Thomas* v. *Zumbalen, supra,* an owner of land leased the same to the trustee of a third person. The third person was indebted to a fourth and made an arrangement with the

fourth whereby, in order to cancel the debt, the lessor was to give a lease directly to the fourth person for a period of two years and a half on the same terms as those of the existing lease, and, at the expiration of that time, the trustee was to have possession under the original lease. The fourth person, after receiving the lease from the lessor, held over after the expiration of his term and then procured another lease for the unexpired portion of the trustee's lease. It was held, waiving the question as to whether the beneficiary of the trust had the right to consent to a surrender, that there was no surrender, the court saying (p. 477) :

> "The consent of Mr. and Mrs. White to the short lease to Kroegmeyer was not a surrender of the original lease, even if the *cestui que trust* had the power to surrender it; but the new lease, being made for her use, was a clear recognition of her rights under the old one. 'A surrender by implication must be in conformity with the intention of the parties. A surrender will not be implied when it is obvious that the second lease was intended to be beneficial, and that the lessee was not to lose any rights he possessed.' (*Van Rensselaer's Heirs* v. *Penniman,* 6 Wend., 569.)"

Flagg v. *Dow, supra,* was an action in tort for unlawful entry upon land. It appeared that an original lease for eight years was executed in 1866. The lease provided for appraising any improvements that might be made on the land by the lessee, and further provided for taking over these improvements at their appraised value or for allowing the lessee to remain in possession until such time as he had used up in rent the value of the improvements. Subsequently the lessor conveyed the land to her two sons, who reconveyed to her a lease for life at a nominal rental, the plan being testamentary in character and being designed to vest the title of the land in the lessor's sons while reserving the management and control in the lessor during her lifetime. As soon as this was done, the lessor executed another lease to the lessee similar in terms to the first lease. The lessor having died, the sons entered upon the land and took possession of the same. The lessee claimed that he was entitled to remain

in possession under the terms of the lease until he had used up in rent the appraised value of the improvements. On the other hand, the sons of the lessor claimed that in accepting the second lease the lessee had surrendered the first lease and, therefore, had lost all rights under this provision. The court, however, held that there had been no surrender, basing its decision upon *Van Rensselaer's Heirs* v. *Penniman, supra.*

In *Witmark* v. *New York Elevated Railroad Co.* (1894), 76 Hun, 302, it appeared that certain leases made in 1869 for a period of twenty-one years were assigned to the plaintiff and his brother in 1871. In 1881 the brothers desired to partition their leasehold interest, so the original leases held by them were surrendered and new leases executed in their stead. Under the new arrangement the plaintiff was the sole lessee of the property affected by the action, which was one to recover damages for injuries caused to the property by the erection and maintenance of an elevated railroad. It appears that the railroad was built after the original lease was executed, but prior to the second lease, and the contention was made that the old lease was surrendered when the new lease was executed and that the plaintiff, in accepting the second lease, took the property in its then condition and could not maintain the action. Holding that no surrender was effected, the Court says (p. 305):

> "Presumptively the surrender of a written lease by the lessee to the lessor, accompanied by the acceptance of a new lease, effects, as between the parties, a surrender of the estate held under the old lease, but it is a rebuttable presumption, especially as between third parties, and when there is no ground for the application of the doctrine of estoppel."

The Court further quotes from *Coe* v. *Hobby,* 72 N. Y. 146, as follows (p. 305):

> " 'A surrender is implied and so effected by operation of law within the statute quoted, when another estate is created by the reversioner or remainderman, with the assent of the termor, incompatible with the existing estate or term. In the case of a term for years, or for life, it may be by the acceptance by the lessee or termor of an estate incompatible with the term, or by the taking

> of a new lease by a lessee. It will not be implied against the intent of the parties, as manifested by their acts; and when such intention cannot be presumed without doing violence to common sense, the presumption will not be supported.' "

Further in the opinion it is said (p. 306) :

> "The transaction of May 1, 1881, was simply a division of the premises into five tenements or lots instead of four, for the purpose of enabling the co-tenants to partition their interests as between themselves. The rent reserved by the five leases was the same as that reserved by the four, and the new leases contained the same covenants and conditions as the old ones. The Witmarks did not surrender possession of the premises, and they did not intend to give up their estate created by the original leases, nor did the landlord understand that it was receiving a surrender of the original estate."

Most of the foregoing cases, it will be observed, were cases where the second lease was a valid and effectual lease and it was held, notwithstanding this fact, that the old lease had not been surrendered for the reason that such a holding would be contrary to the presumed intent of the parties. It is obvious that there is much greater reason for holding that there is no surrender of a former lease when a later lease is invalid and is, therefore, never effectual. The rule under which a former lease is held not to have been surrendered in such a case is that the surrender, if any, to be presumed from the acceptance of a new lease is not an absolute but a conditional surrender, the condition being that the second lease be a valid and effectual lease.

In *Doe* v. *Poole, supra,* it is said (p. 642) :

> "That an express surrender may be on condition either precedent or subsequent, is clear upon the authorities, as, if it be with reservation of rent, and conditioned to be void if the rent be not paid; . . . 'A condition annexed to a surrender may revest the particular estate, because the surrender is conditional; Co. Lit. 218*b*.'
>
> This being so as to express surrenders, we can discover no reason why an implied surrender may not also be taken to be conidtioned to be void on a given event. As the surrender is by implication only, it is equally open to imply a conditional or an absolute surrender:

> and, where the implication of a conditional surrender prevents injustice and gives effect to the real intention of the parties, the true spirit of the law requires that implication to be made, and forbids an implication leading to the contrary consequences. The implication of a condition, that the surrender should be void in case the new grant should fail, appears to us to be free from objection. Indeed, where the terms of a lease import an express surrender solely in consideration of the new grant, we think a construction that such surrender was conditional would be warranted, and would give effect to the intention of the parties."

It was held, accordingly, that the acceptance of a lease which is voidable and which does not pass an interest according to the contract is not a surrender of a preceding lease.

To the same effect is *Doe* v. *Courtenay* (1848), 11 Q. B. 702, 116 Eng. Rep. 636. In this case the owner in fee leased the land by an indenture for a term dependent on certain lives, and then demised the land to his son for life with remainders over, giving the son (the life tenant) the power to grant leases. After the testator's death and during the term of the lease, the son made a fresh lease of the land to the lessee, the new lease providing that it was granted in consideration of the surrender of the old lease, which surrender was accepted by the lessor. The new lease was a bad execution of the power. It was held accordingly that the old lease was not surrendered, the point of the decision being thus stated in the syllabus (p. 637) :

> "Held, that the surrender was inoperative, and the first lease remained in force; and this, whether the second lease, at the time of the demise, was void or only voidable at the will of the tenant for life, and whether the surrender was implied or express: the ground of decision being that the new lease did not pass an interest according to the contract, and therefore the acceptance of it, though with express words as above stated, did not effect an absolute surrender."

It will be noted that the second lease was not void. It bound the lessor during the period of his life so that some estate was granted by it. This fact was held not to have any weight,

however, the true rule being thus stated by Coleridge, *J.* (p. 640):

> "But then it was said that the whole doctrine which vacated the surrender of a prior lease, whether express or implied, where the consideration was the grant of a new lease, applied only to the case where such new lease was void, and not where it was merely voidable; that here the second lease was not void, it bound the grantor, and might have been confirmed by each succeeding tenant for life to its expiration by efflux of time. We have had occasion to consider this doctrine in another of these cases, and to examine the decisions at some length; we will not therefore now repeat that examination, contenting ourselves with saying that the principle to be found laid down by Lord Mansfield in *Wilson* v. *Sewell* (4 Burr, 1980), and *Davison, dem. Bromley* v. *Stanley* (4 Bur. 2213), seems to us the true one; that, where the new lease does not pass an interest according to the contract, the acceptance of it will not operate a surrender of the former lease; that, in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and that, in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void."

The rule laid down in the foregoing cases is now the recognized law.

See *Woodfall on Landlord and Tenant* (19th Ed.), p. 350, wherein it is said:

> "No *implied* surrender by the grant of a new lease will take effect, if the new lease be void; and if the new lease do not pass an interest according to the contract and intention of the parties, an acceptance of it is not an implied surrender of the old lease. The acceptance of a voidable lease which is afterwards made void contrary to the intention of the parties, but which has operated to pass some part of the term contracted for, is not a surrender of a valid former lease inconsistent therewith."

In *Noble* v. *Ward* (1867), L. R. 2 Ex. 135, the parties made a contract in writing for the sale of goods above ten pounds in value, to be delivered at a future time. Before the time for delivery arrived, the parties made a parol agreement extending the time. It was held that the parol agreement, being invalid, did not effect an implied rescission of the former contract.

In the opinion it is said (p. 138):

> "It is quite in accordance with the cases of *Doe d. Egremont* v. *Courtenay* [11 Q. B. 702] and *Doe d. Biddulph* v. *Poole* [11 Q. B. 713], overruling the previous decision of *Doe d. Egremont* v. *Forwood* [3 Q. B. 627; see 11 Q. B. 723], to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention."

In *Easton* v. *Penny,* (1892) 67 Law Times Rep. (N. S.) 290, it is said (p. 292):

> "The rule as to implied surrender of an old by a new lease does not apply when the new lease is void or voidable."

In *Corporation of Canterbury* v. *Cooper,* (1908) 99 Law Times Rep. (N. S.) 612, it appeared that the defendant was in possession of certain premises for which a lease for 300 years was granted in 1599. In 1892 a new lease was executed to the defendant in consideration of the surrender by her of the old lease. The new lease, however, was invalid for failure to comply with certain provisions of the Municipal Corporations Act. In 1908, the plaintiffs brought an action to recover possession of the property. The defense was that, the new lease being invalid, limitations began to run in 1892 and that the action was barred by limitations. It was held, however, that the new lease executed in 1892, having been invalid, did not affect the old lease which terminated in 1899 and, therefore, the action was brought within time.

In the course of the opinion it is said (p. 615):

> "It is clear that under such circumstances the old lease is not surrendered because the intention of the parties governs, and their intention was only to give up the lease in consideration of getting an effectual new lease. An effectual new lease is the correct expression, because it does not mean that it is in consideration of getting a lease which in fact stands. If the lease is effectual, but is afterwards void, then the old lease and the new one are both gone, because the intention of the parties in giving up the old lease is to get an effectual new one, and they do get an effectual new one notwithstanding that they subsequently forfeit the new one and lose it by a forfeiture under it."

This case was affirmed in 100 Law Times Rep. (N. S.) 597. In the opinion of Vaughan Williams, *L. J.*, it is said (p. 598):

> "In my opinion the surrender and the new lease are part and parcel of the same transaction. Under these circumstances this was clearly a conditional surrender."

Knight v. *Williams,* (1900) L. R. 1 Ch. Div. 256, was a suit for specific performance of a contract for surrender of a lease not yet expired and the grant of a new lease for twenty-one years. The only dispute between the parties was as to the right to the custody of the old lease. The lessor insisted on having the lease (the paper) surrendered to him, whereas the lessee claimed the right to hold it or to have a duplicate delivered to him. The court held with the defendant.

In the opinion it is said, by Cozens-Hardy, *J.*, (p. 257).

> "The acceptance of a new lease operates as an implied surrender 'by operation of law' of the old lease within the meaning of s. 3 of the Statute of Frauds, but such surrender differs from an actual surrender by deed: it is not absolute; it is subject to an implied condition that the new lease is good, and if this is not so the old lease remains in force. . . . This being so, I think the plaintiff is wrong in contending that he is in the position of an ordinary purchaser of a lease who can on completion demand the handing over of the lease, and is at liberty to burn it if he thinks fit. The lessee, notwithstanding a surrender by operation of law, retains an interest in the lease."

See, also, *Zick* v. *London United Tramways, Limited* (1908), L. R. 2 K. B. 126. In this case the facts were as follows: The agent of mortgagees in possession had leased certain premises to one Sinclair for a period of three years from March 14, 1905. In May, 1905, the defendants, pursuant to statutory provision, served a notice upon the agent of the mortgagees of election to purchase the land. In January, 1906, for a valuable consideration, Sinclair agreed to hold the lease as trustee for the plaintiff, and, in order to give the plaintiff the legal as well as the beneficial interest in the lease, an agreement was made in February, 1906, whereby the premises were leased to the plaintiff for a period of three years from February 14, 1906. In consideration of the grant of the new lease the old lease was surrendered. The defendants, without any notice to the plaintiff or to Sinclair, entered upon the premises in March, 1907, and took up part of the pavement and otherwise deprived the plaintiff of the use of a portion of the premises. It was for this tort that the action was brought. The contention of the defendants was that the plaintiff had no right, inasmuch as no additional burden could be cast upon the defendants after their notice of election to purchase the premises in May, 1905, and that accordingly the second lease was void. It was further claimed that no right was given to the plaintiff under the first lease because it had been surrendered. This position was held to be untenable, however, Farwell, *J.*, expressly basing his position upon *Doe* v. *Courtenay, supra,* and quoting therefrom as follows (p. 132):

> "The law is laid down by Coleridge, *J.*, in *Doe* v. *Courtenay* [1848, 11 Q. B. 688, at p. 712] 'that, where the new lease does not pass an interest according to the contract, the acceptance of it will not operate a surrender of the former lease; that, in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void and that, in case of an express surrender, so expressed as to shew the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void.' "

The rule as thus laid down in the English cases is also the rule in the United States.

In *18 Am. & Eng. Encyc. of Law* (2nd Ed.), p. 359, it is said:

> "It is now conclusively settled by authority that the second lease, in order to operate as an effectual surrender by operation of law of the first lease, must be a valid one so as to convey the interest it professes to convey to the lessee, and also to bind him to the performance of the covenants or agreements in favor of the lessor.
>
> And it seems that a lease voidable merely will not, if avoided, operate as a surrender of the existing lease."

In *Schieffelin* v. *Carpenter,* (1836) 15 Wend. 400, of which citation has been made, *supra,* it is said (p. 406):

> "It is, however, conclusively settled by authority, that the second lease must be a valid one, so as to convey the interest it professes to convey, to the lessee, and also to bind him to the performance of the covenant or agreement in favor of the lessor, in order to operate as an effectual surrender of the first one."

Further in the course of the opinion it is said (p. 407):

> "The authorities already referred to clearly establish that the second lease, to have the effect claimed [surrender], must pass the interest in the premises according to the contract, or, in other words, carry into legal effect the intent of the parties executing it."

See, also, *Coe* v. *Hobby,* (1878) 72 N. Y. 141. Quotation has already been made from this case, the holding of which is that,

> "the taking a new lease by parol is by operation of law a surrender of the old one, although it be by deed, provided it be a good one, and pass an interest *according to the contract and intention of the parties;* for otherwise the acceptance of it is no implied surrender of the old one."

Further in the course of the opinion it is said (p. 147):

> "The farthest that our courts have gone is to hold that to effect a surrender of an existing lease by operation of law, there must be a new lease, *valid in law,* to pass an interest *according to the contract and intention of the parties."*

To the same effect, see *Smith* v. *Kerr,* (1888) 108 N. Y. 31, 15 N. E. 70, wherein the court quotes with approval from *Coe* v. *Hobby, supra.*

See, also, *Chamberlain* v. *Dunlop,* (1891) 126 N. Y. 45, 26 N. E. 966. In the latter case, a lease for five years provided that it might be extended for two years longer. After the lessor's death, the lessee agreed with the agent of the lessor's heirs to take a new lease of the property. The agent gave him a written lease signed by himself as agent for the heirs, which lease did not pass the entire estate because one of the heirs was an infant and because the widow, who had dower in the property, was not a party to it. The lessee supposed that the lease covered the entire estate. It was held that his acceptance of a new lease did not amount to a surrender of the first lease, the court saying, per Peckham, *J.:*

> "The original lease was not surrendered, for the reason that the new one did not give plaintiff the interest he contracted for, and which he thought he was acquiring."

See, also, *Whitney* v. *Meyers,* (1852) 1 Duer, 266.

The conclusions from the above cases may be briefly summarized as follows:

1. The doctrine that a lease will be deemed to have been surrendered where the lessee accepts a second lease during the term of the first is one based upon the presumed intention of the parties and yields whenever it does violence to such presumed intent.

2. Where the second lease appears to have been merely in confirmation of the first lease and there is no express surrender of the first lease, no surrender will be implied.

3. In no cases will the acceptance of a new lease be held to be a surrender of an old lease where the new lease is, for any reason, invalid, or does not convey the interest and estate which the parties intended it to convey. This is true, notwithstanding that the second lease may be given in considera

tion of the surrender of the old lease, and, in terms, provide for such surrender.

The theory underlying this rule is that the old lease is not surrendered absolutely but only upon the condition that the new lease be valid and effectual. If, therefore, the new lease is not valid or effectual, the condition upon which the first lease was surrendered fails, and there is no surrender of that lease. For the operation of this rule, it is immaterial that the surrender relied upon be express or implied. In either event, it is inoperative unless the second lease is valid and effectual.

XIX.

WE HERE ARGUE BUT ONLY BRIEFLY THE POINT THAT THE ANTI-TRUST LAW OF JULY 2, 1890, DID NOT MAKE UNLAWFUL THE OPERATION BY A SINGLE PROPRIETOR OF LINES OWNED BY HIM AT THE DATE OF THE PASSAGE OF THE ACT WHICH WERE NOT THEN COMPETITIVE BUT WHICH COULD BE MADE COMPETITIVE IF DIVORCED.

Upon the oral argument, counsel for the Government took the extreme position (and in their brief, pp. 170-174, one somewhat modified) that the Sherman Act made unlawful the operation by a single proprietor of lines owned by him at the date of the passage of the Anti-trust law and not then competitive, but which could be made competitive, if divorced. In other words, the Government argues that the Anti-trust law was intended not only to forbid combinations, but also to forbid the unified operation of properties which *could be made competitive* if released from a unified ownership.

The language of the Anti-trust law is open to no such construction. The law forbids the *combination* of *existing competitive* units. If it had been the intention of Congress to forbid the ownership by a single proprietor of two railroads which *could be made to compete,* but which were not competing at the time of the passage of the Sherman Act or for a long period of time before the Act was passed, or which indeed might never

have been competitive, Congress would have expressed that idea with clearness and precision. Such a purpose could be briefly and clearly expressed; Congress in the event supposed would have declared it unlawful for any person to own two railroads which were capable of being made competitive, without regard to whether they ever had not been competitive.

In the petition in this case and throughout the argument, counsel for the Government speak of lines as *"natural* competitors". This term is intended to indicate railroad lines which are not competing, but which could be made to compete, if divorced. Counsel also employ the term *"potential* competitors", by which they mean lines of railroad which could be made to compete, but are not competing and perhaps never have competed.

On this point, then, the question is simply this: Does the Anti-trust law forbid the combining of competitive units (*i. e.,* units that are actually competing), or does it mean to declare unlawful the ownership of property no matter how, or when acquired, or upon what tenure, if they can be made to compete, if divorced, without regard to the question of when they competed, if as a matter of fact, they ever competed?

It is submitted that the meaning of the Anti-trust law is very plain, and that the act does not make unlawful the operation by a single proprietor of lines owned by him and not competitive at the time of the passage of the Act, but which forsooth could be made competitive if divorced.

XX.

THE ARGUMENT OF COUNSEL FOR THE GOVERNMENT IN THIS CASE OVERLOOKS THE VALUE AND IMPORTANCE TO THE GOVERNMENT OF THE GUARANTY OF THE BONDS BY THE SOUTHERN PACIFIC COMPANY IN 1899.

It is argued by the Government that the $100,000,000 issue of Central Pacific bonds bore the guaranty of the Southern Pacific to satisfy the First Mortgage bondholders, and

that the guaranty was of no consequence to the Government. It is not difficult to prove that the guaranty of the Southern Pacific was indispensable to the reorganization of the Central Pacific and to the payment of the Government debt. Nobody expected the Central Pacific to pay $58,000,000 in ten years out of its revenues. The money had to be raised from the sale of its bonds, and unless the bonds were saleable the money with which to pay the Government could not be obtained. It is suggested in Petitioner's Brief (p. 152) and it must have been the fact that the instalment notes were paid largely from funds derived from the sale of the bonds. It was therefore indispensable that the bonds should be saleable, and we have the testimony of Mr. Speyer that they could not have been marketed without the Southern Pacific Company's guaranty. But Mr. Speyer's testimony was not necessary to prove that fact. The earnings of the Central Pacific would not have enabled it to market the bonds involved in the reorganization without the support of the Southern Pacific Company.

Counsel for the Government also overlooks another very important fact. *The Central Pacific might have defaulted in the payment of the notes.* If it had done so, what would the plight of the Government and the Administration have been without the guaranty of the Southern Pacific Company? The Government would hold 47 per cent. of the $100,000,000 issue of bonds payable forty-five years after date. But the act of July 7, 1898, appointing the commission required that the debt should be paid within ten years. What answer would President McKinley and the three members of his Cabinet have given to the country if there had been a default in the payment of the notes and the bonds had been simply a lien on the properties of the Central Pacific Company? A moment's reflection upon this subject will make it very clear that the Government had a very great interest in seeing that the bonds were as saleable and as valuable as it was possible for the Government to have them. It is argued by counsel for the Government that the written agreement did not provide for the guaranty of the Southern Pacific. But the President and his Cabinet understood that the bonds were to be guaranteed,

and we may depend upon it that the transaction would have broken down if the bonds, without the guaranty, had been tendered.

Moreover, the contract with the Government provided (I R. 55), as follows:

> "The payment of the principal and interest of the said notes and of the indebtedness represented thereby, shall be secured by the pledge of $58,820,000, face value, First Refunding Mortgage Four Per Cent. Gold Bonds issued by the Central Pacific Railroad Company, or its successor company having title to the aforesaid railroads, such bonds to be part of an issue hereinafter described not exceeding $100,000,000 in all, one-twentieth part of such pledged bonds to be held as security for each of said notes."

The First Refunding Mortgage of the Central Pacific was fully described in the railroad company contracts and plan of readjustment brought out by Speyer & Co. The Government was familiar with the plan of readjustment and the terms and conditions of the First Refunding Mortgage, and Attorney General Griggs testified that the Government was to get $58,000,000 in bonds of that issue and that he knew that the Southern Pacific Company was to guarantee the issue and, speaking for himself and the administration, he said that no bond not carrying that guaranty would have been satisfactory (III R. 1000-1002). To the same effect is the testimony of Secretary Gage (III R. 1011-1012) and Mr. Speyer (III R. 1182-1185). See also pages 127-134, *supra.*

Moreover, the bonds which the Government received did carry the endorsement of the Southern Pacific Company. The case aptly illustrates the remark attributed to an English Judge: "Tell me what you have done under a contract and I will tell you what the contract means". In other words, the bonds which the Government received were guaranteed and it was therefore agreed with the Government that they should be guaranteed. This circumstance corroborates the testimony of the only survivors of the transaction, who were all called by the defendants and testified as we have indicated.

XXI.

BOTH SIDES SEEM TO BE AGREED, ALTHOUGH FOR DIFFERENT REASONS, THAT THE GOVERNMENT CANNOT BE SAID TO HAVE BEEN AN ACCOMPLICE IN THE VIOLATION OF ITS OWN LAWS: THE DEFENDANTS CONTENDING THAT NO LAWS WERE VIOLATED, AND COUNSEL FOR THE GOVERNMENT ASSERTING EITHER THAT (a) THE GOVERNMENT DID NOT KNOW THE FACTS; OR (b) WAS UNCONSCIOUS OF THE LAW; OR (c) IN FINAL ANALYSIS HAD NO POWER THROUGH ITS OWN OFFICERS TO VIOLATE ITS OWN LAWS.

We have shown elsewhere that the Government's petition in this suit is framed upon the theory that prior to the lease of 1885 the Central Pacific, *with its connections to the Atlantic Coast,* was in competition with the Sunset-Gulf route from San Francisco via New Orleans to New York; and that this competition was suppressed by the lease of February 17, 1885. Counsel for the Government have shifted their position and now contend that the combination by which the Sherman Act was violated occurred February 20, 1899. They say (Pet. Br. 135):

> "The combination complained of in the case at bar was made pursuant to a plan promulgated February 20, 1899."

Again (p. 203):

> "The combination under the plan of February 20, 1899, whereby the Southern Pacific Company, then owning the stock of the Southern Pacific Railroad Company, acquired all the stock of the Central Pacific Railroad Company, was such a combination."

It is important in this connection to note the events immediately preceding February 20, 1899. For several months negotiations for the reorganization of the Central Pacific had been going on. The parties interested in the negotiations were (*a*) the Government with a claim of $58,812,715.48; (*b*) the First Mortgage bondholders representing $57,471,000; (*c*) a large number of stockholders holding an undefined portion of an issue

of $67,275,500 par value; (*d*) the Southern Pacific Company as holder of an unexpired term of about 85 years under Central Pacific lease; (*d*) Speyer & Co. The stock of the Central Pacific had been sold in large blocks and for large sums in England and on the Continent, and presumably at home. This stock had not been sold to railroad operators. It had been sold to investors abroad and presumably to investors at home. The investment had not been a profitable one and from the time of the purchase until the reorganization of the company, the uncertainty respecting the future of the property impaired its value and position. All of this was obviously public knowledge here and in financial circles abroad.

The reorganization of the property could not be accomplished without the concurrence of all the interests represented. The Government was seeking to collect the amount due to it. The Commission was appointed to *settle* the indebtedness and it was bound to arrange a settlement that would bring in the amount due within ten years. There was also a provision in the act that if the terms of settlement were not reached within a year, foreclosure would occur. It was far from the policy of the Government, however, to force a foreclosure and become a railroad proprietor; its object was to collect the debt due to it. The bonded debt plus the Government claim amounted to over $116,000,000, and the record fails to show any possible purchaser for the property at that or any other figure, except the Southern Pacific Company. These were the circumstances of the case when the agreement for the reorganization of the properties took final shape. As is usual in such reorganizations, the papers of agreement were numerous and all the parties in interest did not execute, nor was it expected that they would execute, a single instrument; each of the parties in interest executed the agreement which was appropriate to his interest and engagements. The agreement in respect of the indebtedness of the Government was drawn to bear date February 1, 1899, and the amount due was figured as of that day.

As elsewhere shown, the agreement was executed by President McKinley, Secretary Bliss and Attorney General Griggs at Washington, February 15, 1896, and by Secretary Gage at Boston, February 16, 1896.

This brings us to February 20, 1899, the day which counsel for the Government specifies as the one on which the alleged violation of the Anti-trust law began. What occurred that day? Two things: (*a*) the Secretary of the Treasury, the Secretary of the Interior and the Attorney General submitted to each of the Houses of Congress a report, saying that they had executed the agreement, providing for the payment of the debt to the Government; (*b*) Speyer & Co. on that very day issued and sent out to the financial world at home and abroad the comprehensive plan which had been formulated for the reorganization of the Central Pacific with a view to the payment of the Government debt; and in this plan, prominent and conspicuous, were the provisions that the Southern Pacific Company was (1) to guarantee bonds to the amount of $125,000,000 for the corporate purposes of the Central Pacific; (2) to buy for $20,000,000, as and when required, the preferred shares of the reorganized Central Pacific; (3) to purchase the stock of the Central Pacific, paying for it, par for par, with its own shares, plus $25 per share of bonds issued upon the Central Pacific shares, preferred and common; and (4) to issue in accord with these engagements, its own issue of bonds of $36,819,000 secured by the Central Pacific shares, preferred and common, out of which latter sum it was to set apart $20,000,000 for the purchase of the preferred shares and use the other $16,819,000 to pay $25 per share upon the outstanding stock of the Central Pacific, amounting, as before stated, to $67,275,500. Thus it is that we have before us the so-called combination to restrain commerce made up (*a*) of the action of the President and his Cabinet, and (*b*) of Speyer & Co., reorganization managers.

Is it any wonder, therefore, that while counsel for the Government and ourselves agree that the Government cannot be an accomplice in the violation of its laws, we disagree in the reasons for our attitude? We say that the Government is not an accomplice in the violation of its own laws because its own laws were not violated; while, in the last analysis, the argument of counsel for the Government is that the Government did not violate its own laws either: (*a*) because the Government did not know the facts; or (*b*) if it did know the facts, it was un-

conscious of the law; or (*c*) if it knew the facts and was conscious of the law, it had no power (or at least its officers had no power) to agree to a violation of the law. The case, therefore, in respect of the matter with which we are at the moment dealing, falls within very narrow compass, and we are content to submit it for the consideration of the court without further comment.

XXII.

THE ARGUMENT OF COUNSEL THAT THE 99-YEAR LEASE OF THE CENTRAL PACIFIC LINES TO THE SOUTHERN PACIFIC COMPANY, DATED FEBRUARY 17, 1885, WAS OR IS INVALID, IS WITHOUT MERIT.

It is alleged in the petition (I R. 8):

> "By an instrument dated February 17, 1885, all railroads, equipment and other properties owned by the Central Pacific Railroad Company, predecessor of the Central Pacific Railway Company, were leased to the Southern Pacific Company for a term of ninety-nine years, and all leases of the Southern Pacific Railroad Company's properties held by said Central Pacific Railroad Company were by the same instrument transferred to said Southern Pacific Company. Under that and subsequent leases and amendments the Southern Pacific Company has ever since controlled and operated said properties and the additions thereto."

It is now claimed, for reasons which we shall presently consider, that the lease is invalid. We take the position, however, that there is no allegation in the petition to that effect. On the contrary the petition proceeds upon the theory that the lease was valid as between the parties thereto, and invalid only under the Anti-trust act of July 2, 1890, or perhaps under the Pacific Railroad Laws, or both. In any event, however, there is no allegation to support the argument now made that

the lease was invalid upon any ground not appearing on the face thereof.

Let us consider the grounds upon which counsel for the Government claims that the lease is invalid.

(1) Counsel argue that the power to lease was not included in the articles of association of the Central Pacific Railroad Company. To this we reply that there is a distinction between corporate purposes and corporate powers, and that it was not at all necessary that the powers of corporations should be specified in the articles of association. It is conceded (Pet. Br. p. 229) that in 1880 the California law was changed to permit railroad corporations "to lease to other railroad corporations, 'doing business in the state' ". The only question which we are at the moment dealing with is whether the lease is invalid because the power to make leases was not inserted in the articles of association. At that time, the law did not in terms provide for leases, but the constitution of California from the very beginning reserved the right of the legislature to alter, amend or repeal corporate charters. This gave it the power lawfully to enact that all railroad corporations should have the power to lease their lines. When it did so, all railroad corporations of California thereupon became possessed of the power to lease their lines, and were not required to take any steps themselves to be entitled to exercise that power. The argument of counsel that such a power could not be exercised by a particular corporation except upon the consent of the stockholders is fully answered by the authorities which declare that a stockholder gives his consent in advance when he becomes a stockholder in a corporation organized under the laws of a state which has reserved the right to amend, alter and repeal corporate charters.

In *Market Street Co.* v. *Hellman* (1895), 109 Cal. 571, in reply to a contention that an amendment authorizing the consolidation of corporations was ineffective if applied to a corporation organized prior to the amendment, except with the consent of its stockholders, the court said:

> "When an individual becomes a stockholder in a corporation it is with the implied assent on his part to the right of the legislature to alter and amend the law

within the scope of the constitutional provision, and is as binding upon him as a contract to like effect of his own making would be."

See also:

McKee v. *Chautauqua Assembly* (C. C. A., 2nd C. (1904), 130 Fed. 536.

Schenectady & Saratoga Plank Road Co. vs. *Thatcher* (1854), 11 N. Y. 102.

(2) The second objection to the lease is that the California legislature never authorized the lease because the Southern Pacific Company was not "doing business" in California, when the lease was made February 17, 1885. The lease, however (I R. 13), recites that the Southern Pacific Company is "now doing business in the State of California." There is no allegation in the petition that the Southern Pacific was not doing business in the State of California February 17, 1885, yet counsel for the Government treats this as an issuable point in the case. In the next place the lease of February 17, 1885, provided for a term to commence April 1, 1885, and before that time the Southern Pacific Company had commenced doing business in California, and for a month prior to that date was operating the Southern Pacific Railroad Company and allied lines. It would seem to be clear that if a state law authorized a corporation doing business in that state to lease property, the limitations of the law are met if the lessee commenced doing business in the state by operating the leased property contemporaneously with the commencement of the demised term, even though the lease were executed six weeks before.

Again, it appears (p. 81, *supra*) that the lease by the Southern Pacific Railroad Company to the Southern Pacific Company bore date February 10, 1885, and ran for a term of 99 years *from the date last named.* It is true that the testimony is that the Southern Pacific Company began the *operation* of these lines March 1, 1885, but on February 10, 1885, it became the owner of the Southern Pacific Railroad Company's lines for a 99-year term and this is sufficient to satisfy the require-

ments that it should have been "doing business" in California when it took the lease February 17, 1885.

Moreover, the lease of February 17, 1885, was modified by an agreement between the parties executed January 1, 1888, and at that time the Southern Pacific Company was engaged in doing business in the State of California because it was operating both the Southern Pacific and the Central Pacific lines. It is clear that nothing more need be said on this point.

(3) The third point is that the lease to a competing road is invalid. In the first place that question cannot be raised in a state of the United States in respect of conditions that antedated the enactment of the Anti-trust law of July 2, 1890. In the next place it fairly appears that these lines were operated together as a property with a single identity from their very origin, and they would neither come within the philosophy nor the letter of the rule urged in this objection.

(4) The fourth proposition is that no lease could be made by the Central Pacific to the Southern Pacific Company without the consent of Congress on account of the privileges and franchises conferred upon the Central Pacific by the Pacific Railroad Laws. The Central Pacific, notwithstanding the grants from Congress, remained a California corporation, and it sued and was sued in the State and Federal Courts as such. It derived some powers which might be described as collateral from Congress, but its corporate powers as such and its corporate existence it took and has always held under the laws of the State of California.

The right of the old Central Pacific to sell to the new Central Pacific was recognized in *United States* v. *Union Pacific R. R. Co.* (1912), 226 U. S. 61, 92, where the court, speaking of the transfer of the properties from one company to the other, said:

> "The obligation to keep faith with the Government continued, as did the legislative power of Congress concerning these roads, *notwithstanding changed forms of ownership and organization.*"

If the old Central Pacific could lawfully sell all of its properties to the new Central Pacific without a Congressional

enabling act, it certainly had power to make a lease of its properties to the Southern Pacific Company without Congressional action.

Finally, in the agreement of settlement between the Government and the Central Pacific dated February 1, 1899, the lease of February 17, 1885, and the modifications thereto were expressly recognized, and it was expressly required that it should be subordinate to the hundred million dollar bond issue. This was done by the Southern Pacific and the Government cannot now urge that this lease was invalid because of the lack of Congressional sanction.

In *Central Pacific R. R. Co.* v. *California* (1896), 162 U. S. 91, it was held that:

> "The Central Pacific Company is a corporation of California, recognized as such by the acts of Congress granting it aid and conferring upon it Federal franchises, and it was not the object of those acts to sever its allegiance to the State or transfer the powers and privileges derived from it; nor did those consequences result from the acceptance of the grant by the corporation."

Summary.

In dealing with all of the objections to the lease, we submit that: (*a*) in view of the settlement of the Central Pacific debt, notably the requirement that the Southern Pacific should subordinate its lease to the lien securing the $100,000,000 issue, the Government is estopped to question the validity of the lease; and (*b*) if the lease be attacked at all, it can be attacked only in a suit brought by the State of California.

XXIII.

THIS CASE DOES NOT COME WITHIN ANY RULE OR SUPPOSED RULE DEALING WITH THE PREVENTION OF COMPETITION COMING INTO EXISTENCE.

Counsel for the Government undertake to justify a decree, not upon the ground that competition has been suppressed, but that competition, threatened and imminent, has been prevented from coming into being. They say (Pet. Br., pp. 48-49):

> "On July 7, 1898, Congress passed an act creating and appointing a commission to secure the settlement of this debt without discount. This act provided that unless the sttlement was perfected within one year the President of the United States should proceed at once to foreclose this lien (30 Stat. at Large, chap. 571, p. 659).
>
> "This foreclosure must inevitably have resulted in the acquisition of the Central Pacific Railroad by the United States, or by purchasers not subject to the control of the Southern Pacific Company, unless it was acquired by that company or in its interest.
>
> "The immediate prospect was a naturally competitive railroad, a part of the most direct railroad in the United States, from the Atlantic Ocean to the Pacific Ocean in the control of independent competitors (1141, 243)."

The matter just quoted states the petitioner's whole case. But the Government did not desire foreclosure; it wanted a settlement of the debt that was due to it. There was a precautionary provision, it is true, that if no settlement were obtained, foreclosure should take place. But the Southern Pacific came forward in the manner that has been described, and made possible what the Government wanted; the payment of the Central Pacific debt. Thus was foreclosure averted with the consent and by the desire of the Government.

Counsel argue, however (Pet. Br., pp. 48-49, 170-174), that if foreclosure had not been averted the Central Pacific might have been acquired by "the United States, or by purchasers not subject to the control of the Southern Pacific Company, *unless it*

was acquired by that company or in its interest." In other words, counsel seem to realize that the Southern Pacific might have been a bidder at the foreclosure sale. If that had come to pass, and the property had been struck off in the Government foreclosure to the Southern Pacific Company, would the Government have been thereafter in a position to contest the legality of the acquisition of the property by the Southern Pacific Company?

Counsel treat a transaction involving $116,000,000 as an every-day occurrence. We do not doubt that the Government might have been able to purchase the property, but there is no evidence whatever that any one else had any desire or expectation of acquiring the Central Pacific. It is very clear that the English and Dutch stockholders did not want to operate the property; they had purchased the shares as an investment, and they were anxious above all other things to see the property put upon a firm footing.

Therefore, this argument of counsel for the Government is narrowed down to the contention that we averted Government ownership by paying the Central Pacific debt, that is, by doing precisely what the Government desired. Is the Government now to say to us that as we paid the debt at its request and upon its desire, in point of fact we did it to avert threatened competition through foreclosure, and that therefore our acquisition of the property is illegal under the Anti-trust law? Unless this position is sound there is nothing in the point, and we are ready to take the opinion of the Court upon it. Even less tenable than the position last stated, if that be possible, is the contention of counsel for the Government (Pet. Br., pp. 170-174) that

> "Competition between the Southern Pacific Railroad and the Central Pacific Railroad was directly, immediately, and substantially threatened continuously from 1866 to 1899."

The Central Pacific was controlled and operated from its origin by four men, and these same four men acquired the control of the Southern Pacific Railroad Company in 1870 (Pet. Br., p. 122). Thenceforward these roads were controlled by

the same men or by the survivors of them. It is true that a large percentage of the stock of the Central Pacific was sold on the market between, say, 1878 and 1884, when the Southern Pacific was engaged in very expensive construction. But the Government has argued, and for the purposes of the present point we shall assume, that in 1884 and 1885 about twenty-five per cent. of the capital of the Central Pacific was owned by three of these four men and the widow of the fourth. It should be remembered, however, that of the other seventy-five per cent. of the shares, forty-five per cent. stood in the names of the employees of these same four men or of the company itself. In other words, forty-five per cent. of the capital stock had been sold to persons who, presumably, bought it as an investment in reliance upon the operation of the properties by the four men with whom we are here concerned.

It therefore appears that for all practical purposes these two roads have been operated together as though they had been owned, not by separate corporations but by the four men by whom they were controlled for so long a period. To talk, therefore, of a threat of competition direct, immediate and substantial over a period of thirty-three years is to give words a meaning not in accordance with ordinary usage. So far as the record shows there never was a time when there was any attempt whatever to separate the Central Pacific-Southern Pacific lines. If the Government had not been settled with, foreclosure would have occurred. In that event the lines might have come into the hands of the owners of the Southern Pacific Company, or they might have passed into other hands. This is remote possibility and all conjecture; what is certain and established beyond cavil is that there was no one ready, able or willing to acquire the Central Pacific lines except the Southern Pacific Company.

XXIV.

MATTERS OF SUBSIDIARY IMPORTANCE.

(a) The price paid in 1899 by the Southern Pacific Company for Central Pacific shares was not excessive.

In endeavoring to give a sinister aspect to the reorganization of the Central Pacific in 1899 as one undertaken and accomplished with a view to suppress commerce, counsel for the Government argued that the price paid by the Southern Pacific Company for the Central Pacific stock was excessive. The shares of the Central Pacific were taken over by the Southern Pacific at the price of $125 per share: (*a*) $100 in par value of the stock of the Southern Pacific and $25 per share *in bonds secured by the Central Pacific shares so acquired by the Southern Pacific in the reorganization.* The argument of counsel carries with it the underlying assumption that the stock of the Southern Pacific was saleable at par and presumably that the company was paying dividends. There is no evidence in respect of either fact in the case and we might therefore rely upon technical grounds alone, and say that there is no evidence of the market value of Southern Pacific shares nor that the Southern Pacific Company had paid dividends before that time, or at all. We would not feel justified, however, in invoking such a technical rule, if we did not know the facts, viz., that in January and February, 1899, the price of Southern Pacific shares ranged from $36 to $41 per share and that the company never paid a dividend until October 1, 1905.

(b) Neither the Northern Division of the Southern Pacific Railroad (Map VIII, Appendix) nor its Coast Line opened in 1901 (Map IX, Appendix), bears upon the issues here involved.

Upon the oral argument, we mentioned the fact that in the early days of the Northern Division of the Southern Pacific Railroad Company, that is to say, prior to 1885, the Northern Division (Map VIII, Appendix) was operated independently; in other words, the general manager of that division—which

might be said to be a local road—reported directly to the executive officers of the Southern Pacific Railroad Company, who were, of course, Stanford, Huntington, Hopkins and Crocker, rather than to Mr. A. N. Towne, who was the general manager of the system then operated as "Central Pacific and Leased Lines."

In a passing reference to this situation, we made the point that the Northern Division was utterly unrelated to the lines which give rise to the controversy in this case, which we now repeat and support by a reference to Maps VI and VIII in the Appendix.

In his closing argument, counsel for the Government replied that the Northern Division was of much consequence because it finally grew into the coast-line (See Map IX, Appendix), and that it was in proof that the coast-line carried the great bulk of traffic from San Francisco via Los Angeles to Yuma and thence on over the Sunset-Gulf route; in other words, he practically argued that we are not dealing with the Goshen-Mojave-Los Angeles line, but with the coast-line. All this is very readily answered by the circumstance that the Southern Pacific construction involved is the Sunset-Gulf line, built under the Texas and Pacific Act, which empowered the Southern Pacific to build from near the Tehachapi Pass via Los Angeles to Yuma. It is therefore clear that the coast-line has nothing whatever to do with the question with which we are now concerned; this is rendered even more certain by the fact that the coast-line was not opened until 1901 (p. 206, *supra*), more than two years after the alleged combination of February 20, 1899.

(c) In considering the estoppels against the Government arising out of the settlement of 1899, it is of no consequence whether the provisions thereof which were designed to protect the Government were in the first instance suggested by Mr. Speyer or by the Government itself.

One argument of counsel in respect of the settlement with the Government not elsewhere dealt with, deserves passing notice. The point is made that the plan to which the Government agreed was suggested by Mr. Speyer and that none of its provisions were asked for or exacted by the Government. From this, counsel argue that the Government, although it took ad-

vantage of the provisions obviously designed for its protection and benefit, is not subject to the considerations which give rise to estoppel, because the provisions for its benefit were not asked for or exacted by it, but were offered to it voluntarily. We had supposed that estoppel proceeded upon other considerations and that it arose sometimes from benefits obtained whether asked or not, and sometimes because a change of position would operate as a fraud upon the other contracting party. We submit that the distinction that counsel seeks to import into this case has no foundation in law or morals, and that whether or not the Government asked for the protection which it received, it is bound by the consequences of the protection which it accepted and of which it has enjoyed the benefit

(d) The powers of the Commission under the Act of July 7, 1898, were limited in those particulars only which are expressed in the act. In respect of matters not so limited the Commission had what the act gave it, "full power" in the matter.

Counsel has failed to realize the significance and purpose as well as the plenary power of the Commission created by the Act of July 7, 1898.

There were to be limitations upon its power, but these were all expressed. If there had been any intention on the part of Congress to exclude the possibility of the acquisition of the Central Pacific by the Southern Pacific Company, that limitation would have been imposed in terms by the act.

It is true that refunding measures had failed of passage, but that does not establish the fact that they failed of passage because Congress was unalterably and irrevocably or otherwise opposed to the acquisition of the Central Pacific by the Southern Pacific. Indeed, it was a case of many men, many minds. Some had one view, some had other views. And, as it was all summed up in Senator Gear's report of 1897 (p. 110, *supra*), it was impossible, with all the public business before Congress, to reconcile all views upon this subject and to agree upon a plan involving many details.

The first measure for the appointment of the commission was introduced January 13, 1897 (p. 107, *supra*), and dealt

with the indebtedness of *both* the Union Pacific and Central Pacific.

This was in the last days of President Cleveland's second administration and just before President McKinley took office.

The first measure for the appointment of the Commission introduced during President McKinley's administration was presented March 16, 1897, and dealt with the Central Pacific's indebtedness *alone* (p. 107, *supra*). This is the measure which (after amendments) became a law July 7, 1898, and it is quite evident that Congress, long tired of vainly seeking a *modus operandi* for the settlement of the indebtedness consistent with the divergent views in Congress, and the imperative and engrossing demands of other public business, determined to entrust the whole matter to the administration and to give to the President and three members of his Cabinet "full power to settle the indebtedness" (I R. 51), subject only to those limitations which were stated in the act. In other words, Congress determined to sink the divergent views held in the two Houses and to confide the matter to the judgment, discretion and authority of three members of the President's Cabinet, with "full power" to act if and when such action was approved by the President.

This view of the case is fully supported by the attitude of Senator Morgan, who gave his support to the passage of the Act of July 7, 1898, without attempting to impose any limitations upon the power of the Commission except those stated in the act.

If it had been intended that there should have been any other limitations, it is reasonably to be supposed that Senator Morgan, long acquainted with the subject matter of the legislation, would have made an attempt further to limit the powers of the Commission. That he did not do so is of controlling importance and significance.

All of the proceedings in Congress prior to July 7, 1898, may be appropriately referred to in order to ascertain the grasp of this subject matter which was possessed by Congress; and when we realize the full grasp it had of the subject, we will be able to give true significance to the particulars of the terms of the settlement on which no limitation was put. Chief among

these is the matter of the future relation of the Southern Pacific Company to the Central Pacific lines. And we may say again that the whole matter was summed up by Speaker Cannon when he said (p. 114, *supra*) that, by the enactment of the law, the Commission was authorized to arrange for the settlement of the debt "with the Southern Pacific or with the Union Pacific or with the Rock Island, or with the Northwestern or with anybody" else.

(e) Because of the 30 years' de facto unification of the properties, this case is in a class apart.

In the consideration of this case, and particularly in respect of the claims of suppression of competition and discriminations against the Union Pacific, it is to be recalled that we are dealing with a condition of thirty years *de facto* existence. In many cases under the Anti-trust act, courts have had occasion to consider unification of recent date, and they have had occasion in connection therewith to say that what is happening at the present moment may not happen in the future. In our case, however, we have a history of thirty years to draw upon, to show that during so long a period there has been neither suppression of competition nor unfair treatment of the Union Pacific.

(f) Objections to evidence.

In their brief, counsel say that their objections to evidence "are not waived" (Pet. Br. p. 158). In view of this reservation, we also reserve and stand upon our objections.

In the brief of counsel (pp. 35, 55), they twice quote testimony which the Pacific Railroad Commission reported in 1887 as evidence given before that body by the President of the Central Pacific Railroad Company. It is, we think, very well understood that testimony reported by a Congressional Committee is not receivable as evidence: (*a*) either as to the *fact* that the testimony was given, or (*b*) as to the *truth* of the facts said to have been testified to by the witness. (See, *United States* v. *Reading Co.* (1910), 183 Fed. 427, 442; *Parks Estate* (Or.), 81 Pac. 83; *Stetson* v. *Stetson,* 146 N. Y. S. 245).

It is true, and we so concede and claim, that it is proper for the Court to resort to all legislative proceedings and executive action so far as they bear upon any of the issues of this case. (See, 7 Encyc. of the U. S. Supreme Court Reports, 687, where an abundance of authority on this point will be found.)

XXV.

IN ITS LAST ANALYSIS THE RELIEF HERE SOUGHT IS NOT JUDICIAL IN ITS NATURE. THE GOVERNMENT DOES NOT SEEK THE DESTRUCTION OF A NEW AND UNLAWFULLY CREATED CONDITION WHICH TOOK THE PLACE OF AN OLD AND NATURAL ONE; IT SEEKS THE DESTRUCTION OF AN OLD AND NATURAL CONDITION IN ORDER THAT IT MAY CREATE BY A NEW AND UNTRIED EXPERIMENT A CONDITION WHICH HAS NO PROTOTYPE.

The obvious purpose of a suit under the restraint of commerce clause of the Anti-trust law is to restore the existence of an old and natural condition which has been destroyed by the substitution of a new and artificial condition unlawfully created. This is usually, if not invariably, accomplished by the destruction of the new condition so unlawfully created.

In dealing with such cases, courts are engaged in administering relief entirely judicial in its nature; they are ascertaining (*a*) that an old and natural condition did exist; (*b*) that it was superseded by a new and artificial condition; (*c*) that the latter is unlawful; and finally, (*d*) that they can restore the old condition by destroying the new.

This suit does not present the case of an old and natural condition which has been superseded. We have an old and natural condition which never has been superseded; a condition which has existed from the origin of the properties. The Court, therefore, is not asked to ascertain what the old condition was and to restore it, because there can be no question of restoring what has never been displaced. What the Govern-

ment asks is the destruction of the old condition and the substitution in its place of a new condition, experimental in character, which has no prototype.

In asking the Court to engage in the creation of experimental conditions which have never existed, we submit the Government asks for relief which is not judicial in its nature.

XXVI.

CONCLUSION.

It is respectfully submitted that a decree should be entered in accordance with the prayer of the answer (I R. 47), namely, that the defendants "may be hence dismissed with their costs in this behalf expended."

Respectfully submitted,

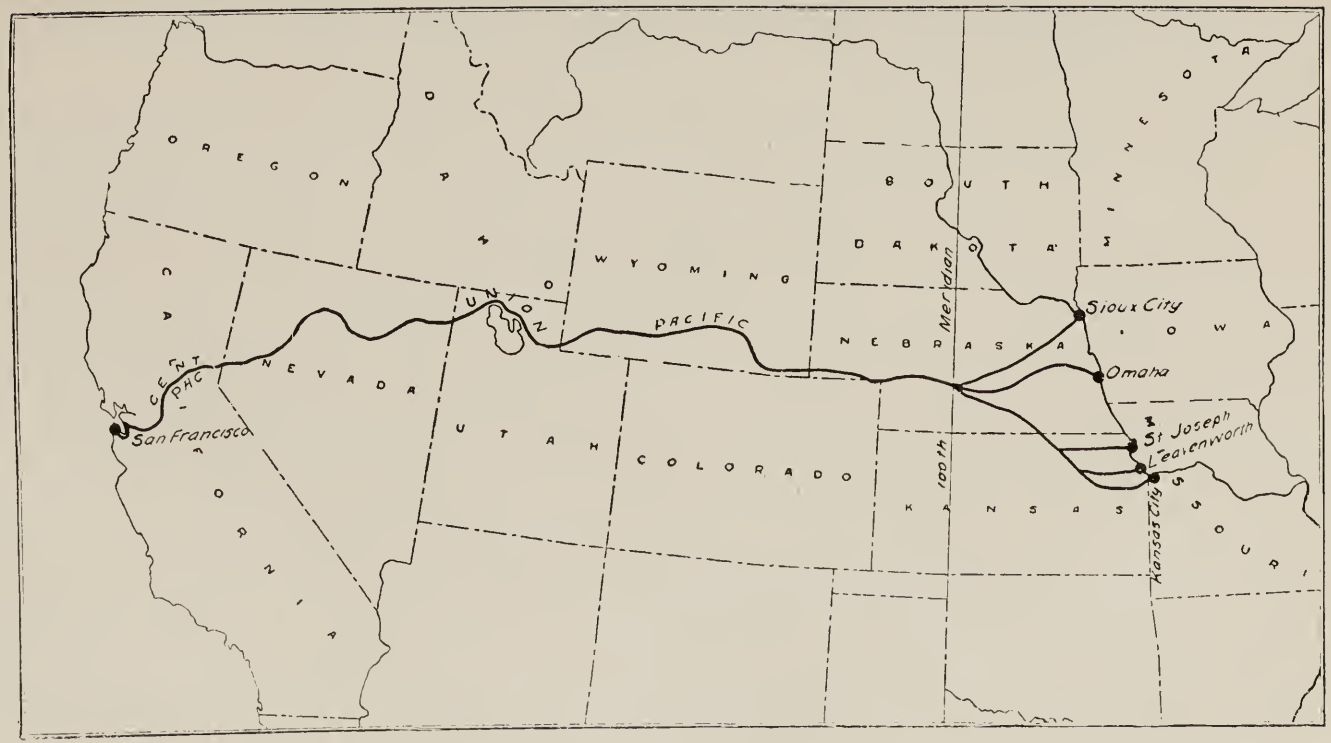
WM. F. HERRIN,
Solicitor for Defendants.

J. P. BLAIR,
P. F. DUNNE,
GARRET W. MCENERNEY,
Of Counsel.

New York, December 11, 1915.

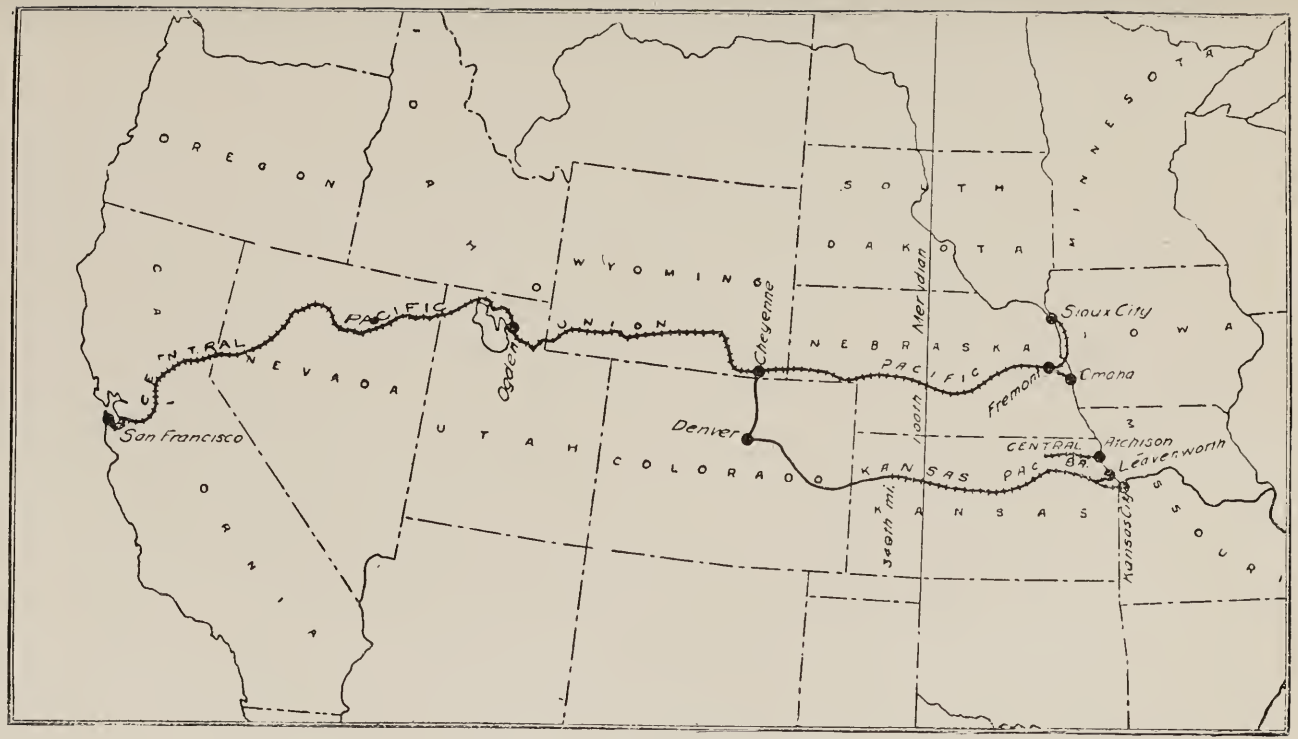
APPENDIX

INDEX



I.

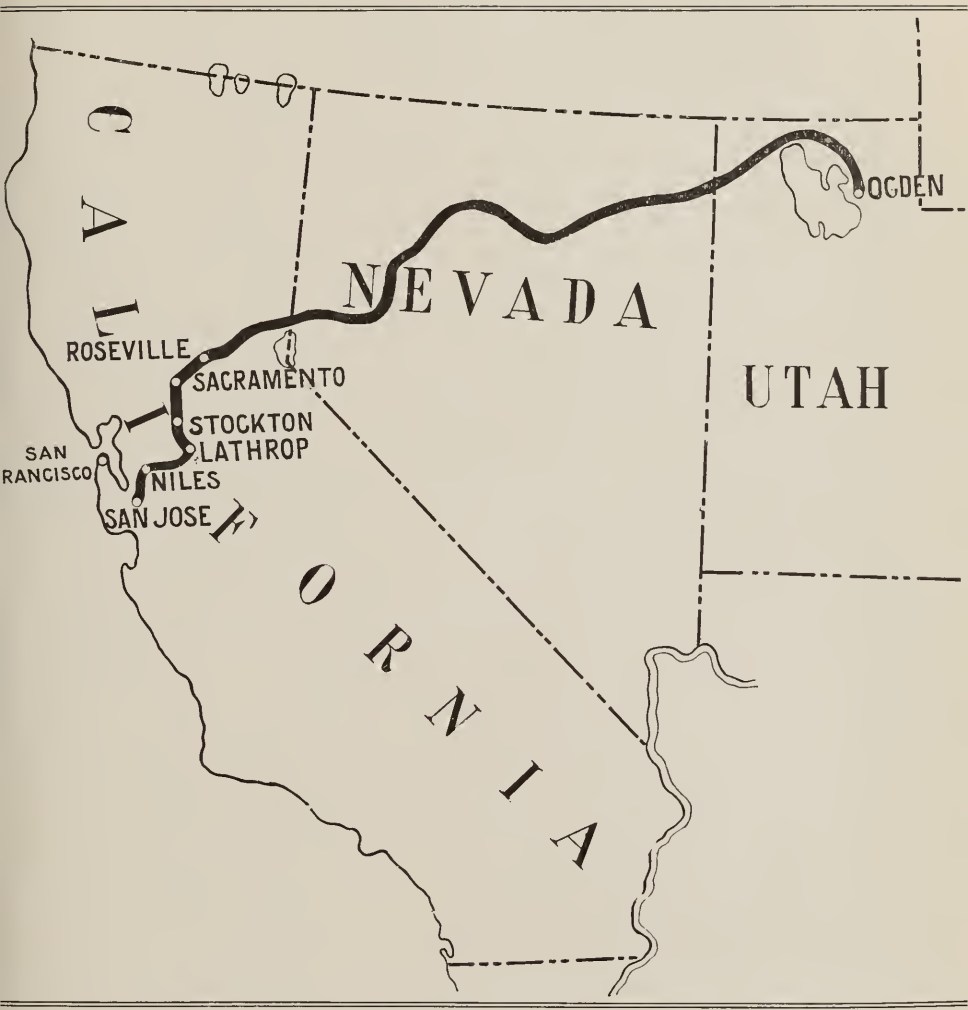
PACIFIC RAILROADS (MISSOURI RIVER TO PACIFIC OCEAN) AS CONTEMPLATED BY THE ACT OF JULY 1, 1862.



II.

PACIFIC RAILROADS AS CONSTRUCTED.

Bond-aided road is shown by hatched line.

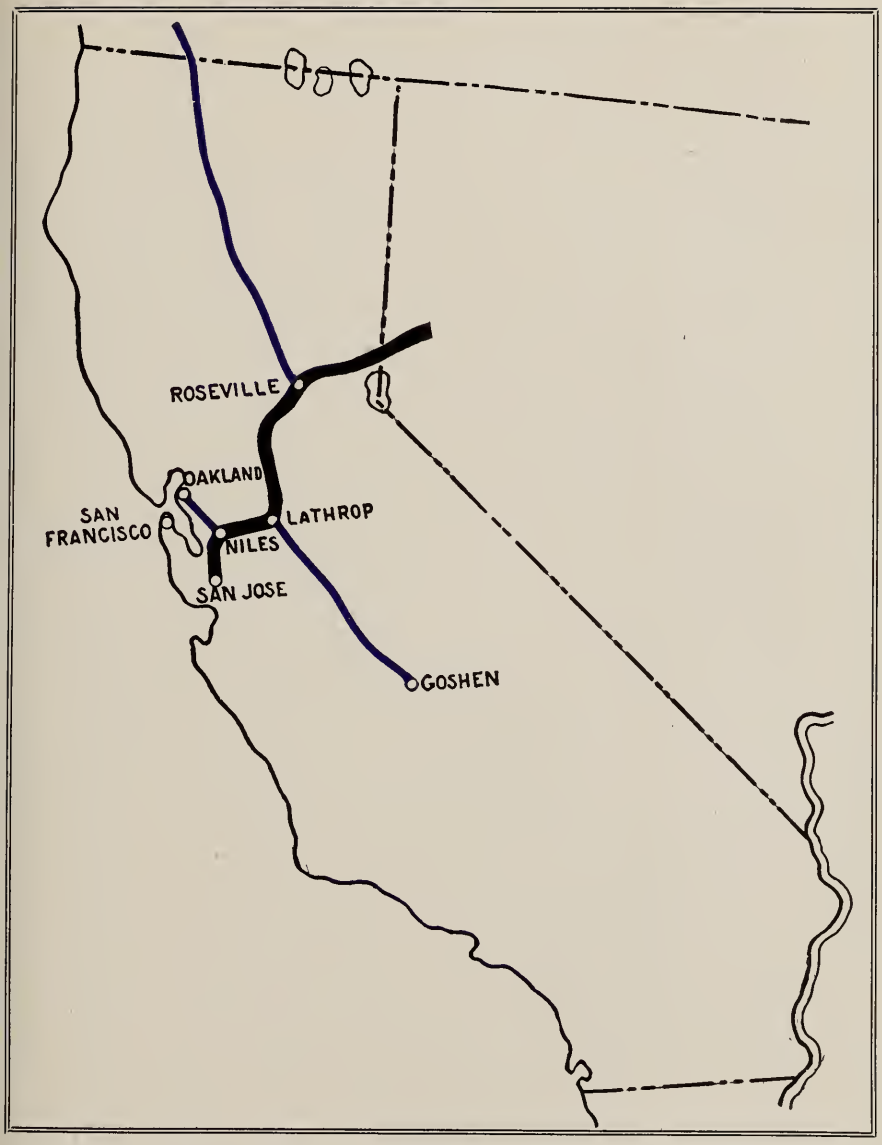


III.

BOND-AIDED LINE: OGDEN-SACRAMENTO-SAN JOSE.

Ogden-Sacramento: Central Pacific Construction.
Sacramento-San Jose: Western Pacific Construction.

Note: The Western Pacific was absorbed by the Central Pacific in the consolidation of June 23, 1870.

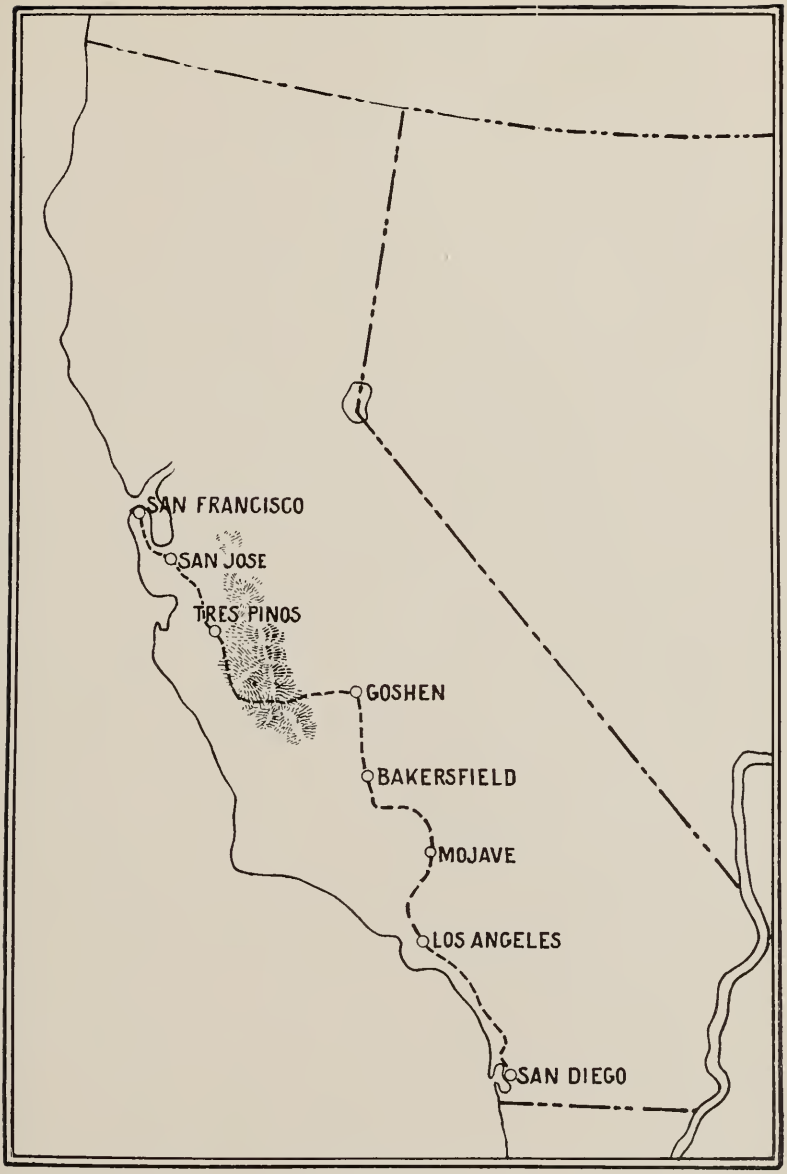


IV.

CENTRAL PACIFIC NON-BOND-AIDED EXTENSIONS.

1. Roseville-Oregon line.
2. Niles-Oakland.
3. Lathrop-Goshen.

Non-bond-aided extensions.
Main bond-aided line.

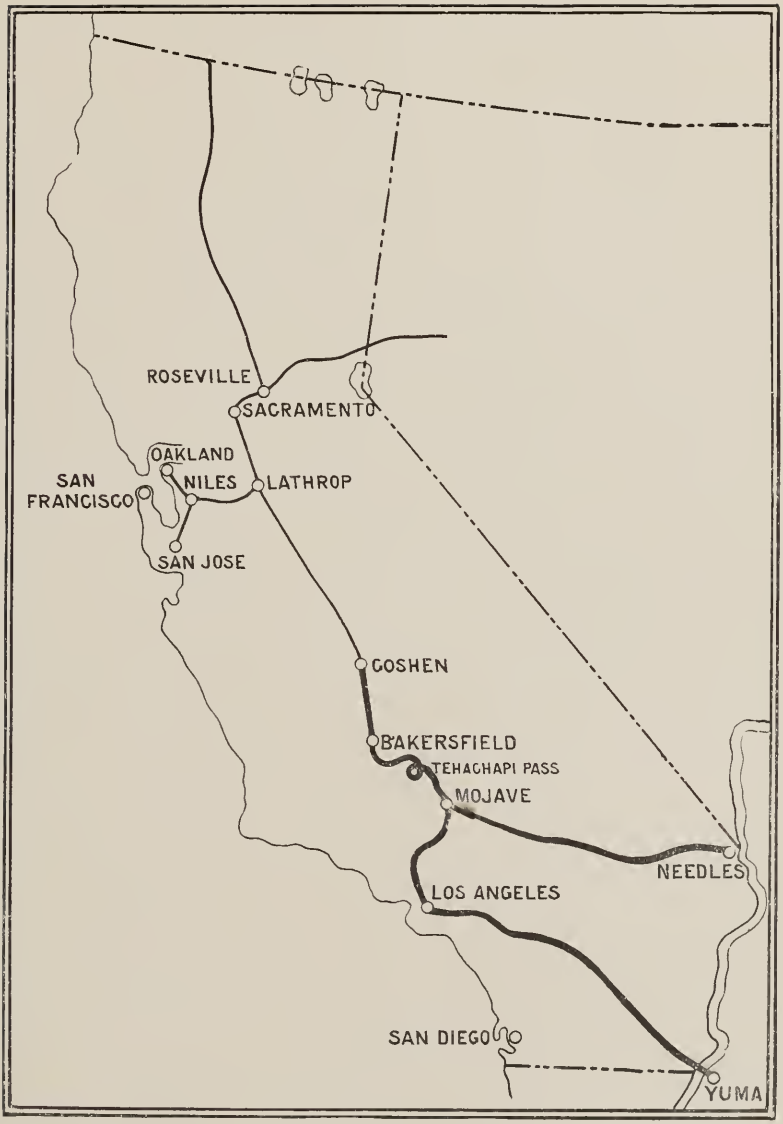


V.

APPROXIMATE ROUTE OF SOUTHERN PACIFIC RAILROAD COMPANY'S LINE, CONTEMPLATED IN THE ARTICLES OF ASSOCIATION, DECEMBER 2, 1865.

Note: The line is not indicated that was to extend "eastward through the county of San Diego to the eastern line of the State of California, there to connect with a contemplated road from the eastern line of the State of California to the Mississippi River." [Art. of Assoc.]

At this time "no authority had been given by Congress for the construction of any railroad from the Mississippi River to the eastern line of the State of California; although the thirty-third and thirty-fifth parallels of latitude had been publicly discussed as probable lines of future railroads." [32 Fed. ft. p. 460.]



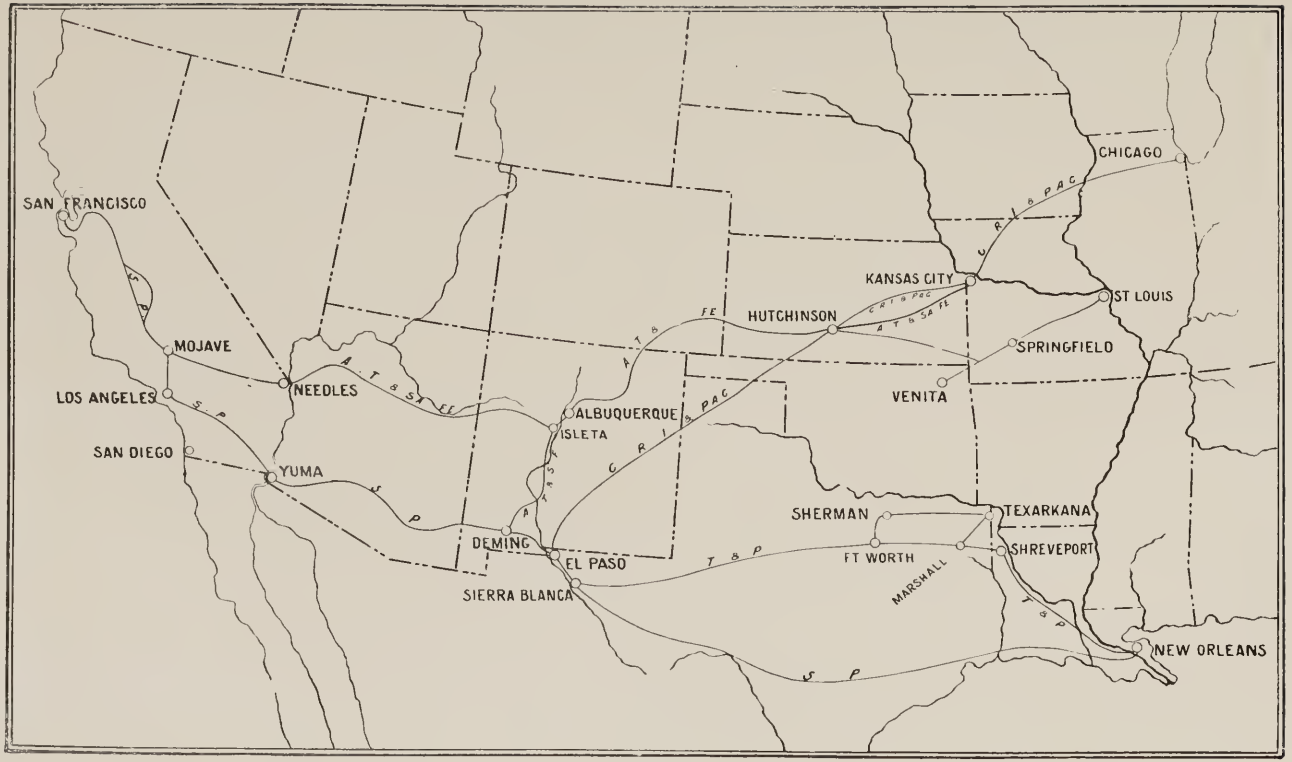
VI.

CENTRAL PACIFIC-SOUTHERN PACIFIC ARTERIAL SYSTEM.

Showing the four lines to the boundaries of California authorized by Congress:

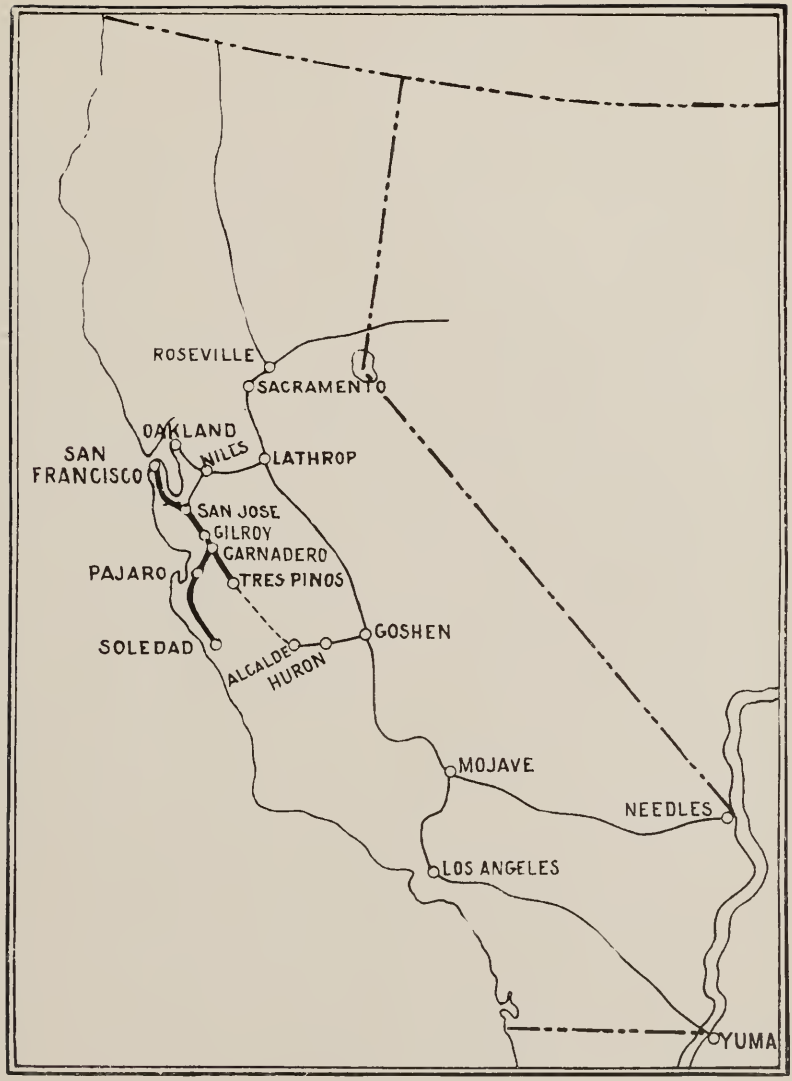
(1) Sacramento-Ogden: Act. of July 1, 1862 (12 Stat. 489).
(2) Roseville-Oregon Line: Act of July 25, 1866 (14 Stat. 239).
(3) Goshen-Mojave-Needles: Act of July 27, 1866 (14 Stat. 292).
(4) Mojave-Los Angeles-Yuma: Act of Mar. 3, 1871 (16 Stat. 573).

——— Central Pacific.
——— Southern Pacific.



VII.

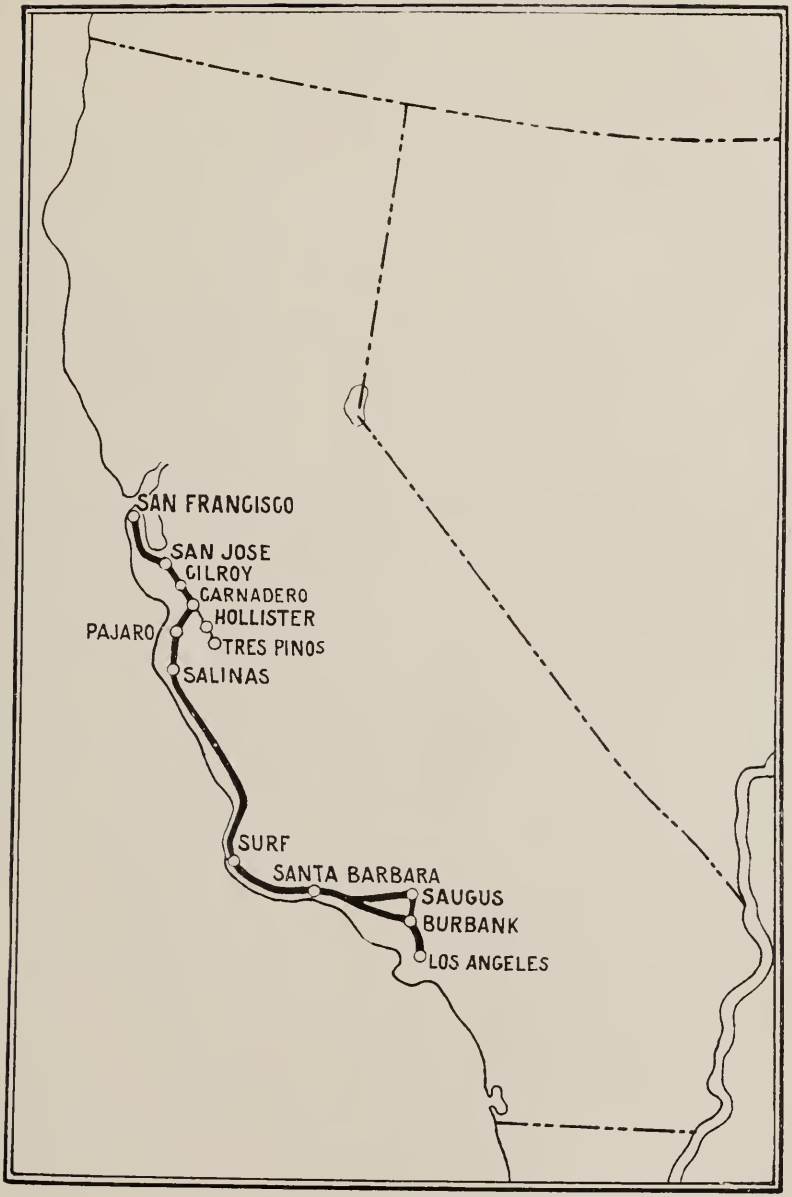
EASTERN RAIL CONNECTIONS OF THE SOUTHERN PACIFIC.



VIII.

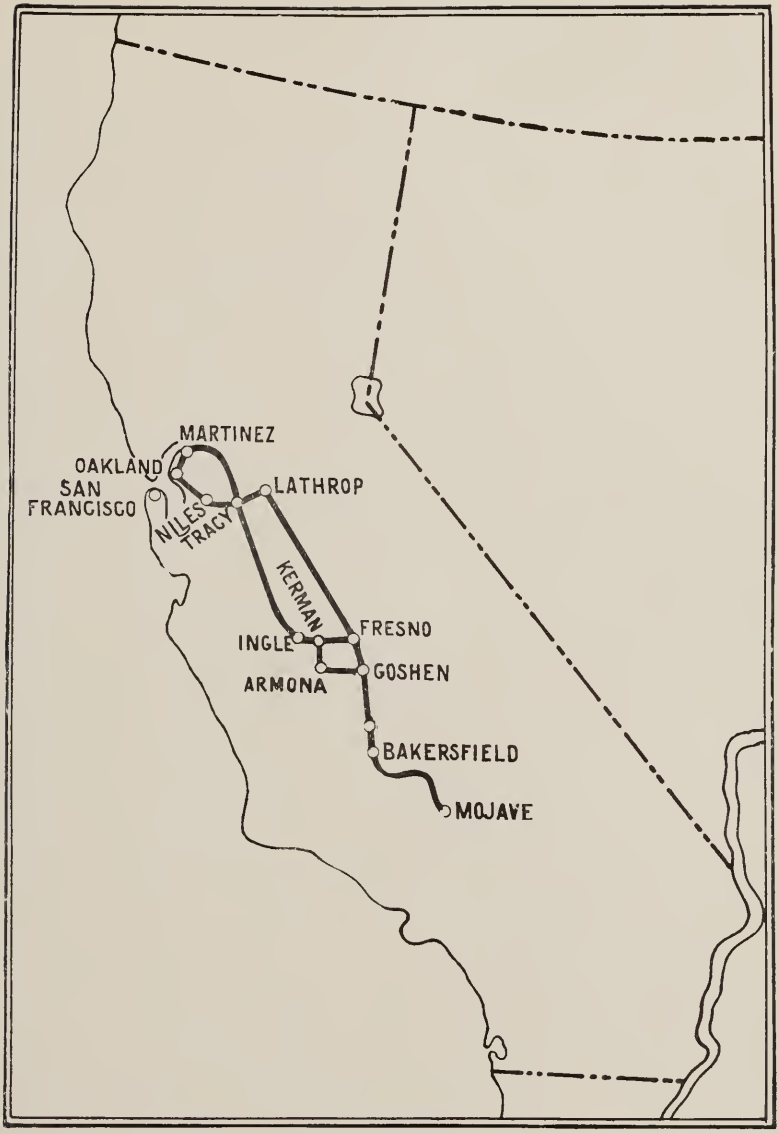
NORTHERN DIVISION OF SOUTHERN PACIFIC RAILROAD COMPANY AS IT EXISTED IN 1873, AND ITS RELATION GEOGRAPHICALLY TO THE CENTRAL PACIFIC-SOUTHERN PACIFIC ARTERIAL SYSTEM.

———Northern Division of Southern Pacific Railroad Company.
_____Central Pacific-Southern Pacific Arterial System.
- - - - - -Unbuilt connection between Tres Pinos and Alcalde.



IX.

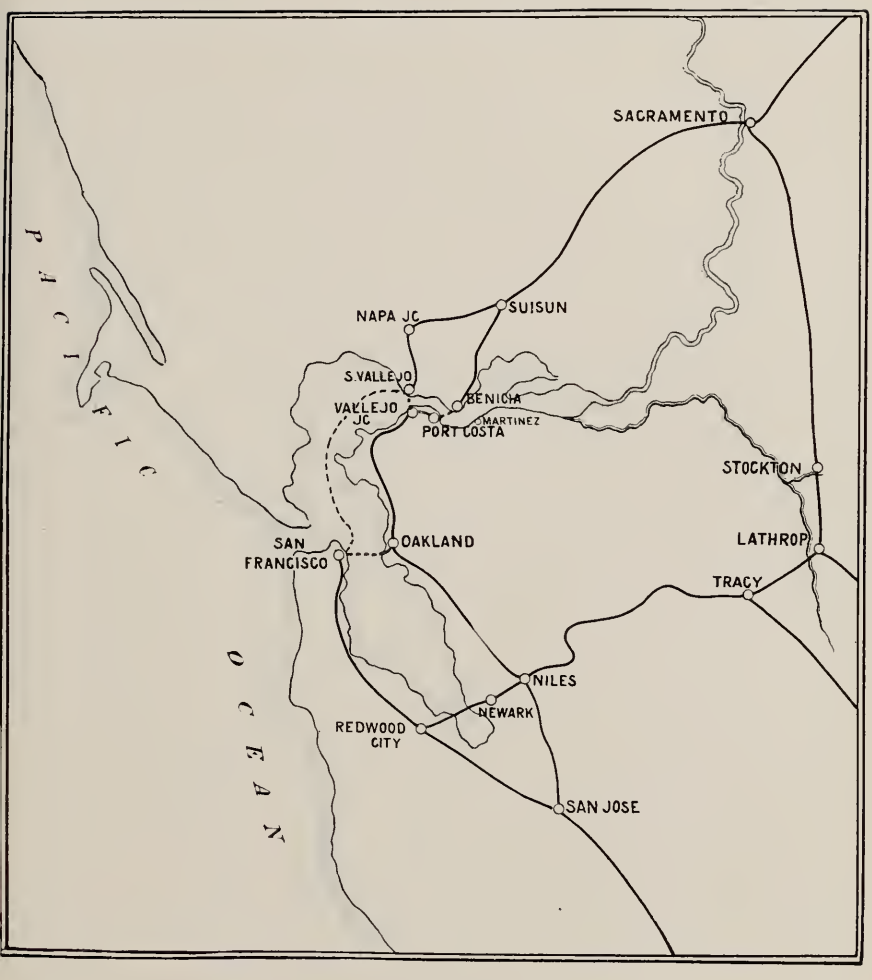
SOUTHERN PACIFIC COMPANY'S COAST LINE OPENED 1901.
SAN FRANCISCO-LOS ANGELES.



X.

SAN JOAQUIN VALLEY LINES.

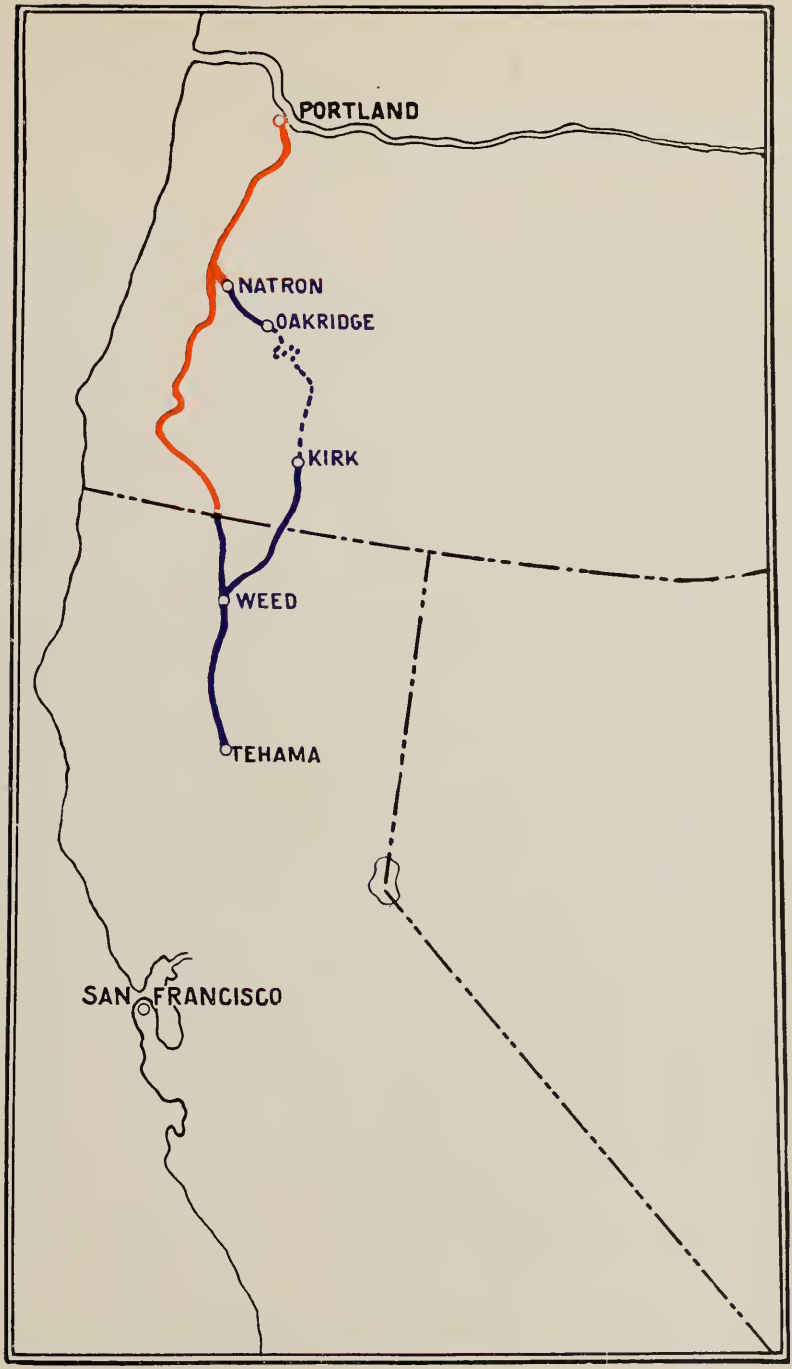
1. Main Line: Lathrop-Goshen.
2. West Side Line (1891-1892): Tracy-Ingle-Kerman-Armona-Goshen.
3. West Side Line (1892-1915): Tracy-Ingle-Kerman-Fresno-Goshen.



XI.

ROUTES BETWEEN SACRAMENTO AND SAN FRANCISCO.

1. Sacramento-Lathrop-Niles-Oakland-San Francisco.
2. Sacramento-Napa Junction-South Vallejo-San Francisco.
3. Sacramento, via Benicia cut-off-Suisun-Benicia-Oakland-San Francisco.
4. Sacramento-Lathrop-Niles-San Jose-San Francisco.
5. Sacramento-Lathrop-Niles, via Dumbarton cut-off-Newark-Redwood-San Francisco.



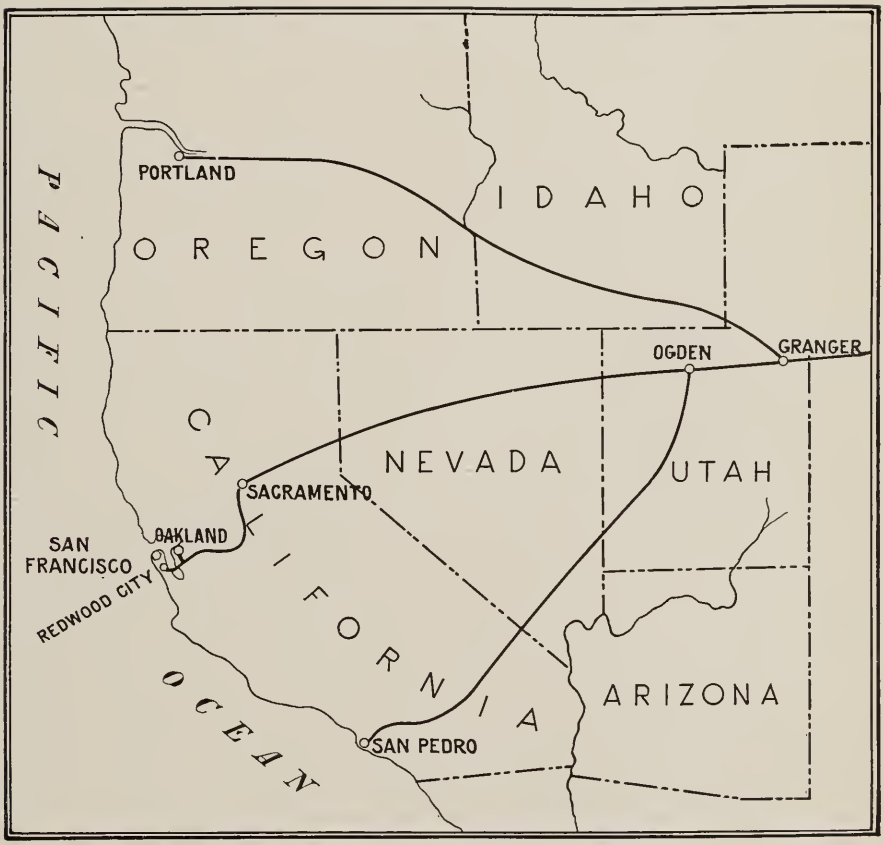
XII.

RAIL CONNECTION BETWEEN TEHAMA, CALIFORNIA, AND PORTLAND, OREGON.

Southern Pacific.
Central Pacific.
Central Pacific-Unfinished section.

XIII.

PRESENT SOUTHERN PACIFIC-CENTRAL PACIFIC SYSTEM.



XIV.

UNION PACIFIC LINES TO THE PACIFIC COAST, AND THEIR RELATION GEOGRAPHICALLY TO THE CENTRAL PACIFIC MAIN LINE.

XV.

UNION PACIFIC LINES TO THE PACIFIC COAST, AND THEIR RELATION GEOGRAPHICALLY TO THE CENTRAL PACIFIC MAIN LINE, FEEDERS AND EXTENSIONS.

XVI.

PHOTOGRAPHIC RELIEF MAP OF CALIFORNIA.